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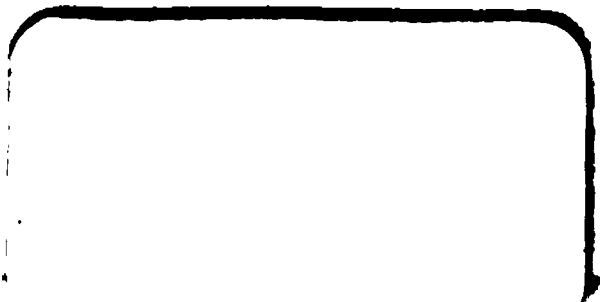
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THE AMERICAN LAW REGISTER.

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PRIVILEGED COMMUNICATIONS.

I. TO LAWYERS.

§ 1. AT common law confidential communications made by a client to his attorney, counsellor, or solicitor, in the course of any professional employment, and relating to the subject thereof, are protected, on grounds of public policy, and the latter will not be permitted to testify to such communications, unless the privilege is waived by the client. This rule has been substantially incorporated into the statutes of various States, and, by these, information obtained by any physician or surgeon, while attending a patient, and necessary for his proper treatment, and confessions made to a minister or priest in his professional character, are also protected, and cannot be given in evidence by either of them without the consent of the patient or person confessing.

§ 2. The general rule on this subject, both at common law and under statutes, may be stated as follows: All communications made to an attorney or counsellor-at-law, in the course of any personal employment relating to the subject thereof, and which are made in consequence of the relation in which the parties stand to each other, and all communications made by a client to his attorney or counsel for the purpose of professional advice or assistance, are privileged and protected from disclosure, whether they relate to a suit pending or contemplated, or to any other matter necessary or

proper for such advice or aid; and such attorney or counsellor cannot be compelled, nor will he be permitted, to disclose such communications in evidence without the consent of his client.

This general rule of evidence was grafted into the common law of England at an early date, for we find it recognized in a case in the reign of Elizabeth in the 16th century: *Berd v. Lovelace*, Cary (Eng. Ch.), 88. And the general doctrine was fully considered and illustrated in a subsequent, but early case, in which Lord Chancellor BROUGHAM, assisted by consultation with Lord LYNDHURST, TINDAL, C. J., and PARK, J., said: "This protection is not qualified by any proceedings pending or in contemplation. If touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or witnesses:" *Greenough v. Gaskell* (1833), 1 My. & K. 101.

These general principles of the law have been fortified and sustained by many decisions, both English and American, whether a suit was pending, or contemplated, or not, *Bacon v. Frisbie* (1880), 80 N. Y. 394; provided it is made for the purpose of obtaining professional advice, *Flack's Adm. v. Ncill* (1862), 26 Tex. 273; *Parker v. Carter* (1814), 4 Munf. (Va.) 273; *Hatton v. Robinson* (1833), 14 Pick. (Mass.) 416; *McLellan v. Longfellow* (1851), 32 Me. 496; *Dunn v. Amos* (1861), 14 Wisc. 115; *Wetherbee v. Ezekiel* (1852), 25 Vt. 47; *Alderman v. The People* (1857), 4 Mich. 414; *Parkhurst v. McGraw* (1852), 24 Miss. 134; *Young v. Georgia* (1880), 65 Ga. 525. As to the ownership of the note in suit, *Miller v. Weeks* (1853), 22 Pa. 89; *Beltzhoover v. Blackstock* (1834), 3 Watts (Pa.) 21. Whether difficulty in granting a second lease

was suggested by counsel or client, *Turton v. Barber* (1874), 17 L. R. Eq. 329; or, in fact, anything passing between counsel and client during consultation, *Bigler v. Reyher* (1873), 43 Ind. 112; and even if the retainer or employment is declined, *Crisler v. Garland* (1848), 11 Sm. & Marsh. 186. As to correspondence between solicitor preparing to commence an action and third parties, *M'Corquodale v. Bell* (1876), 45 L. J. C. P. Div. 329. As to correspondence between solicitor and employes, *Wilson v. Northampton and Banbury Junction Rwy. Co.* (1872), 14 L. R. Eq. 477; *Macfarlan v. Holt* (1872), Id. 580. As to confidential correspondence with predecessors in title and their solicitors, *Minet v. Morgan* (1873), 8 L. R. Ch. App. 361; *Mostyn v. W. Mostyn C. & I. Co. Lmtd.*, (1876), 34 L. T. (N. S.) C. P. Div. 581.

It is not essential that any fee or compensation be actually paid, or that there should be a general retainer: *Bacon v. Frisbie*, *supra*; *Earle v. Grout* (1873), 46 Vt. 118; *Cross v. Riggins* (1872), 50 Mo. 335.

It is not sufficient that the witness is ready and willing to testify as to confidential communications which are privileged. They are protected as a rule of law, and the Courts will interpose and determine from the facts whether the witness was acting in a professional capacity when the communications were made: *Bank of Utica v. Mersereau* (1848), 3 Barb. Chan. 528; *Bacon v. Frisbie*, *supra*; *Foster v. Hall* (1831), 12 Pick. (Mass.) 89; *People v. Atkinson* (1870), 40 Cal. 284.

An attorney cannot be compelled or allowed to testify as to communications made to him by two clients in a suit by a stranger against one or both of them without the consent of both: *post*, § 7; *Whiting v. Barney* (1862), 38 Barb. (N. Y.) 397. Nor will he be permitted, on a bill of discovery, to disclose communications of his clients, nor produce letters passing between them, or through intermediate agents, and containing or asking legal advice: *Mitchell's Case* (1861), 12 Abb. Prac. (N. Y.) 259.

Counsel may be compelled to disclose the existence of the professional relation, *Chirac v. Reinicker* (1826), 11 Wheat. (U. S.) 280; and the abstract legal opinion asked where no communication of facts to be concealed was made, *McMannus v.*

State (1858), 2 Head, 218; and what occurred in his presence, as the execution of a document, although he was present in consequence of his engagement as counsel: *Patten v. Moore* (1854), 29 N. H. 163.

Friendly and confidential, but not professional, communications to a lawyer are not privileged: *Branden v. Gowing* (1854), 7 Rich. Law (S. C.) 459.

§ 3. *Other persons are privileged.*—The rule is not limited to the attorney or counsellor, but extends to his clerk, assistant attorney, or other agent, while in the discharge of his duty; and it covers confidential communications made to him, or in his presence or hearing, if made for the purpose of advice or assistance, by the client of the attorney or counsellor, as where it is made to an attorney's clerk to enable him to prepare a complaint or other paper: *Landsberger v. Gorham* (1855), 5 Cal. 450; *Taylor v. Foster* (1825), 2 C. & P. 195; *Port v. Hayne* (1824), 1 Id. 545; *Jackson v. French* (1829), 3 Wend. (N. Y.) 337; *Brand v. Brand* (1870), 39 How. Pr. (N. Y.) 193.

So the rule extends to a necessary interpreter, employed to translate communications between the client and the attorney or his assistants: *Jackson v. French*, *supra*; *Parker v. Carter*, *supra*; *Andrews v. Solomon* (1816), 1 Pet. C. C. 356.

The rule is limited to those who are in fact attorneys or counsellors-at-law, and their clerks or assistants, and does not extend to those who chance to be present at a conference between a client and his attorney: *Jackson v. French*, *supra*. Nor does it protect communications overheard by a clerk in the office, who does business for himself, or by others who may by chance be in the vicinity: *Id.*; *Barnes v. Harris* (1851), 7 Cush. (Mass.) 574; *Hoy v. Morris* (1859), 13 Gray (Mass.), 519; *Holmes v. Kimball* (1850), 22 Vt. 555; *Goddard v. Gardner* (1859), 28 Conn. 172; *Sample v. Frost* (1859), 10 Ia. 266. Nor those made when both parties are present: *Whitney v. Barney* (1864), 30 N. Y. 300; *Britton v. Lorenz* (1871), 45 N. Y. 51; *Gas Stove Co.'s Appeal* (1888), 117 Pa. 514; nor statements made by a third person to an attorney at the request of his client: *Perkins v. Guy* (1877), 55 Miss. 153.

Communications made by a former client after the relation

of client and attorney has ceased are not privileged unless artifice has been used to obtain them: *Gordon v. Hess* (1816), 18 Johns. (N. Y.) 492; *Mandeville v. Gurnsey* (1862), 38 Barb. (N. Y.) 225; *Williams v. Benton* (1857), 12 La. An 91. Nor information obtained from other sources, though the client may have communicated the same to the attorney: *Brandt v. Klein* (1820), 17 Johns. (N. Y.) 885; *Crosby v. Berger* (1844), 11 Paige (N. Y.), 377; *Chillicothe, etc., R. Co. v. Jameson* (1868), 48 Ill. 281. Nor acts nor transactions of a client with third persons or with an adverse party, though the attorney may be professionally engaged therein: *Coveny v. Tannahill* (1841), 1 Hill (N. Y.), 33; *Hebbard v. Haughian* (1877), 70 N. Y. 54; *Randel v. Yates* (1873), 48 Miss. 685. Nor letters written by an attorney pursuant to instructions of his client: *Reg. v. Downer* (1880), 43 L. T. N. S. 445. Nor statements made by a client to a third person in the presence of his attorney: *Satterlee v. Bliss* (1869), 36 Cal. 487; *Gallagher v. Williamson* (1863), 23 Id. 331; *Patten v. Moor* (1854), 29 N. H. 163; *Beeson v. Beeson* (1848), 9 Pa. 279. Nor communications made by a client which have no relation to the advice or aid sought or obtained by him: *Ante*, § 2; *State v. Mewherter* (1877), 46 Ia. 88; *Foster v. Hall, supra*. Nor communications made to one who is supposed to be an attorney, but who is not: *Fountain v. Young* (1807), 6 Esp. 113; see, also, *Rochester City Bk. v. Suydam* (1851), 5 How. Pr. (N. Y.) 254; *Foster v. Hall, supra*.

Generally the rule does not apply to communications made between parties to a controversy before an attorney solicited by them to draw up papers or agreements in relation to the matter, or where they relate to agreements made between such parties and the attorney of one of them, or where made by one party to his counsel in the presence of the other party or his attorney, or where made by one party or his attorney to the attorney of the other: *Gore v. Harris* (1851), 8 Eng. L. & E. 147; *McLean v. Clark* (1872), 47 Ga. 24; *Parish v. Gates* (1856), 29 Ala. 254; *Pulford's Appeal* (1880), 48 Conn. 247; *Dunn v. Amos* (1861), 14 Wis. 106; *Gas Stove, etc., Co.'s Appeal* (1888), 117 Pa. 514; *Root v. Wright* (1880), 21 Hun (N. Y.), 344; *Britton v. Lorenz* (1871), 45 N. Y. 57; *Hubbard v.*

Haughian (1877), 70 N. Y. 61; *House v. House* (1886), 61 Mich. 69.

Communications are not privileged when made by one who is merely a nominal party to a suit, and who has no real interest in it, or made to counsel after he has refused to act as such for the party making it, or to an attorney who has a personal interest in the matter to which the communication relates, or where the matter of the communication becomes necessary to be shown to protect the personal rights of the attorney: *Allen v. Harrison* (1888), 30 Vt. 219; *Rochester City Bk. v. Suydam* (1851), 5 How. (N. Y.) 254; *Setzar v. Wilson* (1844), 4 Ired. L. 501.

The rule is held not to apply to an attorney who is called upon merely to perform some manual service, as to draw up a written instrument, according to directions, without a request to give any legal advice or assistance, and without giving any: *Hatton v. Robinson* (1833), 14 Pick. (Mass.) 416; *Alden v. Goddard* (1882), 73 Me. 345; *Borum v. Fouts* (1860), 15 Ind. 50; *Randel v. Yates* (1878), 48 Miss. 685; *De Wolf v. Strader* (1861), 26 Ill. 225. Nor does the rule prevent a scrivener, who drew a will, from testifying as to the reasons and purposes of the testator in making certain bequests: *Sanford v. Sanford* (1872), 61 Barb. (N. Y.) 305; S. C. 5 Lans. (N. Y.) 486; *Russell v. Jackson* (1851), 15 Jur. 1117; see, also, *Matter of Austin* (1886), 42 Hun (N. Y.), 516; *Matter of Boury* (1887), 8 N. Y. 809. And generally the rule applies only to such matters as the attorney has learned from his client or on his client's behalf, and which were committed to him in the capacity of an attorney, and in which capacity only he received them: *Rex v. Brewer* (1834), 6 C. & P. 363; *Annesley v. Anglesea* (1743), 17 How. St. Tr. 1239; *Gillard v. Bates* (1840), 6 M. & W. 547; *Greenough v. Gaskell* (1833), 1 My. & K. 104; *Walsingham v. Goodricke* (1843), 3 Hare, 122; *Whiting v. Barney* (1864), 30 N. Y. 330.

§ 4. *The rule covers all methods of communication.*—The general rule covers all methods of communication and all sources of information, oral or otherwise, such as deeds and other papers, and paintings, pictures, photographs, weapons, and other instruments and mechanical devices, if they are

used to convey to the attorney information necessary or useful in the discharge of his professional duty to his client: *Kellogg v. Kellogg*, *supra*; *Crosby v. Berger*, *supra*; *Durkee v. Leonard* (1882), 4 Vt. 612; *Anon.* (1811), 8 Mass. 370; *Lynde v. Judd* (1807), 3 Day (Conn.), 499; *Mills v. Oddy* (1834), 6 C. & P. 728. And in such a case the contents of the deed or other document or instrument of writing would be protected by the general rule and the statute: *Genet v. Ketchum* (1875), 62 N. Y. 628; *Parker v. Carter* (1814), *supra*.

§ 5. *The privilege may be waived.*—At common law, as well as under the statutes, the protection continues forever, unless waived by the client. Even his death is not a waiver of it: *Hatton v. Robinson* (1883), 14 Pick. (Mass.) 416; *Bank of Utica v. Mercereau* (1848), 3 Barb. Ch. (N. Y.) 528; *Yordan v. Hess* (1816), 13 Johns. (N. Y.) 492; *Chase's Case* (1827), 1 Bland's Ch. (Md.) 206. As to waiver of the statutory protection of the "information," acquired by a physician or surgeon while attending a patient, see *post*, § 14. It has been held that if a party to an action offers himself as a witness on the trial, this gives the adverse party a right to cross-examine him as to any confidential communication made to his attorney: *Inhabitants of Woburn v. Henshaw* (1869), 101 Mass. 193; *Com. v. Mullen* (1867), 97 Id. 545. But, unless the party in such a case gave some evidence relating to such communication on his examination in chief, the weight of authority would seem to be against the waiver in such a case: *Duttenhofer v. State* (1877), 34 Ohio St. 91; *State v. White* (1877), 19 Kans. 445; *Bigler v. Reyher* (1873), 43 Ind. 112; *Barker v. Kuhn* (1874), 38 Ia. 395; *Bobo v. Bryson* (1860), 21 Ark. 387; *Hemenway v. Smith* (1856), 28 Vt. 701.

§ 6. *Unanimous consent required to waive where several communicate jointly.*—If the communication is made by or on behalf of two or more parties, in reference to a matter of joint interest or concern, the obligation of secrecy can only be removed by the concurrence of all the parties concerned, and one or more cannot permit or require a disclosure of such privileged communications as evidence, without the consent of all. The seal of secrecy can only be removed by unanimous consent: *Whitney v. Barney* (1862), 38 Barb. (N. Y.) 397; *Root*

v. *Wright* (1881), 84 N. Y. 72; *Chahoon v. Com.* (1871), 21 Gratt. (Va.) 822; *Robson v. Kemp* (1808), 4 Esp. 288; 5 Id. 52; *Strode v. Seaton* (1834), 2 Al. & El. 171; *McLellan v. Longfellow* (1851), 32 Me. 494; *Bank of Utica v. Mersereau*, *supra*. Unless a controversy arise between the clients, *Rice v. Rice* (1854), 14 B. Mon. (Ky.) 417; because then the communications are made in the presence of all the parties to the controversy: *Britton v. Lorenz* (1871), 45 N. Y. 57.

§ 7. *Does not apply where advice is sought to aid commission of crime.*—Confidential communications made by a person to an attorney, with the view of obtaining advice or assistance in the commission of a crime, are not protected, and the attorney may be required to disclose such communications: *People v. Blakeley* (1859), 4 Park. Cr. R. (N. Y.) 176; *People v. Sheriff* (1859), 29 Barb. (N. Y.) 622; *Graham v. People* (1872), 63 Id. 488; *Coveney v. Tannahill*, *supra*; S. C. 37 Am. Dec. 287; *Bank of Utica v. Mersereau*, *supra*; *State v. Mewherter* (1877), 46 Ia. 88; *Orman v. State* (1887), 22 Tex. 604; *Queen v. Cox* (1884), 14 Q. B. Div. (Eng.) 158; 15 Cox Cr. Cas. 611; 5 Am. Cr. R. 140; *Rex v. Dixon* (1765), 3 Burr. (N. Y.) 1687; *Anon.* (1811), 8 Mass. 370. But the privilege does extend to communications made for the purpose of obtaining information and advice in the perpetration of a wrongful act not criminal *per se*, as where it consists of a fraud on creditors: *Gartside v. Outram* (1857), 26 L. J. Ch. 115; *Charlton v. Coombes* (1868), 32 Id. 284; *Maxham v. Place* (1874), 46 Vt. 434; *Peck v. Williams* (1861), 13 Abb. Pr. 71.

The attorney may be required to testify as to his custody of a written instrument, in order to lay the foundation for secondary evidence of its contents: *Mitchell's Case* (1861), 12 Abb. Pr. 259. And as to the date of a written instrument prepared by him, and whether it has been ante-dated or altered, or as to the date of its actual delivery, but not as to the object of its execution or the subject-matter of its execution: *Bank of Utica v. Mersereau*, *supra*; *Coveney v. Tannahill*, *supra*.

Where the same attorney acted for a mortgagee in lending money, and also for the mortgagor in preparing the mortgage

deed, and in doing so received a forged will from the mortgagor as a part of his title-deeds, on a trial of the latter for the forgery, it was held that the forged will was not a privileged communication, and the attorney was required to produce it: *Reg. v. Avery* (1838), 8 C. & P. 596. And where the attorney for the plaintiff wrote a letter for the defendant to a third person about the matter afterwards in suit, the communication was not privileged: *Shore v. Bedford* (1848), 5 Man. & Gr. 271.

II. TO PHYSICIANS.

§ 8. *Information acquired by a physician or surgeon, when protected.*—At common law confidential communications by a patient to his physician or surgeon, however necessary they might be to enable him to act in a professional capacity, were not privileged or protected from disclosure on the witness-stand. But by statutes in various States all communications made by a patient to his physician or surgeon, and all information acquired by him while attending a patient in a professional capacity, which was important to enable him so to act, are protected. And under these statutes, the general principles of construction, and doctrines deducible therefrom, would be the same as under the common-law rule of protection of confidential communications made to an attorney in his professional capacity.

§ 9. *The statutes on the subject are given at the close of this article.*

§ 10. *The statutes protect all information acquired by a physician or surgeon.*—It will be observed that the statutory provisions relating to physicians and surgeons are broader than those relating to attorneys and counsellors-at-law. The physician's knowledge may be acquired from the patient himself, from the statements of others who may surround the patient at the time, or from observation of his appearance and symptoms: *Edington v. Mutual L. Ins. Co.* (1876), 67 N. Y. 185; *Dilleber v. Home L. Ins. Co.* (1877), 69 Id. 256; *Briggs v. Briggs* (1870), 20 Mich. 34; *Gartside v. Conn. Mut. L. Ins. Co.* (1882), 76 Mo. 446; *Grattan v. Met. L. Ins. Co.* (1880), 80 N. Y. 281; *Campau v. North* (1878), 39 Mich. 606. The

statutes do not apply to one who is not licensed as a physician or surgeon: *Wiel v. Cowles* (1887), 45 Hun (N. Y.), 307; *People v. Schuyler* (1887), 43 Id. 88; *Renihan v. Dennin* (1886), 103 N. Y. 573. Nor do they apply to "information" acquired by a physician, if it was not obtained while he was acting in his professional character and the relation of physician and patient in fact existed. Thus, where a physician of a jail, where a prisoner charged with crime was confined, had medical charge of all the prisoners, and the defendant was examined by him at the request of both parties, it was held proper for him to testify as to the defendant's sanity: *People v. Schuyler* (1887), 106 N. Y. 298.

§ 11. *Construction of the statutes.*—Some controversy has arisen in reference to what is required to be shown as to the importance or necessity of the information, in order to protect it, and how and when this should be made to appear. It seems generally conceded that the word "necessary," as used in the statutes, was not used in its strict sense of absolute necessity, but was intended to cover all useful and convenient information for the purpose of proper professional treatment of the patient. It has been said that the plain language of the statute should not be made broader by construction, and that the necessity of the "information" acquired by the physician should be made clearly to appear before evidence thereof is excluded: See EARLE, J., in *Edington v. Aetna Ins. Co.* (1879), 77 N. Y. 564; *Campau v. North* (1878), 39 Mich. 606. On the other hand, it seems that the necessity of the "information" has been inferred from the relation of patient and physician and the character of the information: *Edington v. Met. L. Ins. Co.* (1876), 67 N. Y. 185. Thus, where the action was brought to recover damages for injuries sustained by negligence of the defendant, and the plaintiff called the physician who treated him for his injuries, to prove expenses incurred by such treatment as an element of damages, and upon cross-examination he was asked, if the plaintiff had the venereal disease while under his care as a physician, to which the plaintiff objected as calling for privileged "information," it was held that the question implied that, if the witness acquired any information

on the subject, he obtained it in a professional way, and that it was protected by the statute: *Sloan v. New York Cent. R. Co.* (1871), 45 N. Y. 125; *Gratton v. Met. L. Ins. Co.* (1880), 80 Id. 281. A physician's certificate, given in good faith, that another person is insane, would be privileged in an action against him for libel therefor, if the certificate was given in a legal proceeding under a statute: *Perkins v. Mitchell* (1860), 31 Barb. (N. Y.) 461. But if the statement in any such case is false in fact and malicious in motive, the injured party may recover: *Somerville v. Hawkins* (1850), 8 Eng. L. & E. 503; *Harrison v. Bush* (1855), 82 Id. 173; *Thorn v. Blanchard* (1809), 5 Johns. (N. Y.) 508; *O'Donaghue v. McGovern* (1840), 23 Wend. (N. Y.) 26; *Van Wyck v. Aspinwall* (1858), 17 N. Y. 190; *White v. Nicholls* (1845), 8 How. (U. S.) 266.

§ 12. *Information not necessary not protected.*—The statutes protect "information" that is "necessary," or valuable or useful, to the physician or surgeon to prescribe or act in a professional way and no other. As to any information, therefore, which has no relation to the treatment of the patient, the physician or surgeon may be required to testify, and neither the patient nor other person can object on the ground that it is within the statute. Thus, it has been held that a physician may testify to an admission made by his patient during treatment, that the injury which he was called upon to treat him for existed before the time of the alleged injury, for which an action for damages was brought, unless it appears affirmatively that such information was essential for a proper treatment: *Campau v. North, supra*; *Brown v. Rome W. & O. R. Co.* (1887), 45 Hun (N. Y.), 439; *Reniham v. Dennin, supra*; *Edington v. Aetna L. Ins. Co., supra*. And information obtained from a person who consults with a physician or surgeon for the purpose of getting advice or direction how to perpetrate a crime, would not be protected by the statute, for the reason that the relation of patient and physician or surgeon would not exist for the purposes required, and the information would not be "necessary" for any treatment of the patient. Thus, where a physician was consulted by a person as to the means of procuring an abortion in an action for seduction against the latter, it was held that the

information acquired by the physician from the defendant was not within the protection of the statute, and that he was competent to testify thereto: *Hewett v. Prime* (1889), 21 Wend. (N. Y.) 79. See, also, *ante*, § 7; *post*, § 14.

In case of a conspiracy between a physician and his patient to commit a crime, neither could shield himself under the statute: *Ante*, § 8; *People v. Sheriff* (1859), 29 Barb. (N. Y.) 622.

§ 18. *Waiver of protection ; who may waive it.*—The object of the statutes is to secure the confidence of the patient in disclosing whatever may be of importance to the physician or surgeon, and in furnishing all means and sources of information which may contribute to aid him in his professional investigations and duties, and, to accomplish this, such information is protected from disclosure. The protection is personal to the patient; and being so, the patient might waive the privilege on general principles of the law. But the statutes of various States expressly provide for such waivers. See the statutes in the note, *infra*. No physician or surgeon can give evidence of the protected "information," unless the protection is expressly waived by the patient. Even the death of the patient will not remove the seal of secrecy: *Westover v. Aetna L. Ins. Co.* (1885), 99 N. Y. 56; *Grattan v. Met. L. Ins. Co.*, *supra*. Without a waiver the evidence would be incompetent, as it is prohibited by the statutes.

And unless offered by the patient, would be open to the objection of any person interested: *Cohen v. Cont. L. Ins. Co.* (1876), 41 N. Y. Super. Ct. 296; *Johnson v. Johnson* (1884), 4 Paige (N. Y.), 460; *People v. Stout* (1858), 8 Park. Cr. R. 670; *Edington v. Met. L. Ins. Co.*, *supra*; *People v. Murphy* (1886), 101 N. Y. 126. It has, however, been held that the prohibited "information" of a physician or surgeon must be disclosed, when it is called for, either by the patient, or, in case of his death, by his representative. And this, because the object of the statute is to protect the patient: *Scripps v. Foster* (1879), 41 Mich. 742; *G. R. & I. R. Co. v. Martin* (1879), *Id.* 667; *Harriman v. Stowe* (1874), 57 Mo. 98; *Pier-son v. People* (1880), 79 N. Y. 424; *Fay v. Harlan* (1880), 128 Mass. 244; *Quaife et ux. v. C. & N. R. Co.* (1879), 48 Wisc. 514; *Ill. C. R. Co. v. Sutton* (1867), 42 Ill. 438.

Thus, where an action was brought by the widow to recover damages for the death of her husband, caused by the negligence of the defendant, the testimony of the attending physician of the deceased, who treated him for the injury, as to "information" obtained while thus treating him, was held proper on her behalf: *Groll v. Tower* (1884), 85 Mo. 249.

But the physician cannot give evidence of such "information" against the objection of either the patient or his representatives. Thus, where an action was brought by a widow to recover on a policy of insurance on the life of her deceased husband, and the defendant offered to prove by the physician who attended him at the time that the deceased had the delirium tremens, an objection thereto was held properly sustained: *Gartside v. Conn. Mut. Ins. Co.* (1882), 76 Mo. 446.

It has been held in New York that, although the representative of a deceased person may claim the benefit of the statutory protection, he cannot waive it; that it would be the same with respect to confessions and communications to a minister or attorney. Thus, where an action in that State was brought upon a life-insurance policy issued to the plaintiff's testator, which provided that it should be void, if the insured should commit suicide; and he did commit suicide by hanging himself. The plaintiff claimed that the deceased was insane at the time, and, to sustain this, called a physician who had attended him a short time before his death. This was objected to by the defendant as incompetent under the statute, and on appeal the objection was sustained: *Westover v. Ætna L. Ins. Co.* (1885), 99 N. Y. 56; *Edington v. Met. L. Ins. Co.* (1876), 67 N. Y. 185; S. C., *supra*; *Grattan v. Met. L. Ins. Co.* (1880), 80 Id. 281; *Bowman v. Norton*, 5 C. & P. 177; *Pierson v. People*, *supra*; *Staunton v. Parker* (1879), 19 Hun (N. Y.), 55. If the patient calls the physician and examines him *in chief* as to the privileged matter, this is held to be a waiver, so as to permit the adverse party to examine him in relation thereto at any subsequent trial of the action: *Reniham v. Dennin*, *supra*; *De Witt v. Barley* (1853), 9 N. Y. 371; *McKinney v. Grand St., etc., R. Co.* (1887), 104 Id. 352; *People v. Barker* (1886), 60 Mich. 277. But the use of one physician's evidence in such a case would

not constitute a waiver of protection as to the "information" of other physicians: *Hope v. Troy & Lans. R. Co.* (1886), 40 Hun (N. Y.), 488; *Westover v. Aetna L. Ins. Co.*, *supra*. The patient's attorney may, on behalf of the patient, waive the privilege: *Alberti v. New York, etc., R. Co.* (1887), 48 Hun (N. Y.), 421.

§ 14. *Exception in criminal cases.*—The protection afforded to "information" obtained by a physician or surgeon covers all cases where he may be called as a witness, which would include criminal as well as civil cases, notwithstanding the purposes of justice in some cases would seem to demand an exception to the rule. But in a recent criminal case the statute was so construed as not to apply to the peculiar circumstances of it. The defendant was indicted and tried for murder by poisoning the deceased. The testimony of the physician who attended and treated him as to "information" obtained while he was his patient, and in reference to his symptoms and the cause of his death, was competent evidence. This decision is placed on the ground that the privilege of suppressing such information is personal, to prevent the abuse of the confidential relation between the patient and his physician, and for the benefit of the former, and that, when there is no desire or object for suppressing it, on the part of the patient or others personally interested on his behalf, and criminal justice demands it, it is competent evidence: *Pierson v. People* (1879), 18 Hun (N. Y.), 249; (1880), 79 N. Y. 424. See, also, *Grand Rapids & Ind. R. Co. v. Martin*, *Scripps v. Foster*, and *Edington v. Met. L. Ins. Co.*, *supra*; *People v. Murphy* (1885), 8 N. Y. Crim. R. 838.

"Information" obtained from a person who consults a physician as to the mode of producing an abortion, contrary to law, is not protected by the statute: *Hewitt v. Prime* (1839), 21 Wend. (N. Y.) 79; *Ante*, § 7. So it has been held that, as the protection is personal to the patient, a person charged with murder cannot object to the testimony of the physician who attended his victim: *Pierson v. People*, *supra*. See, also, *ante*, § 7. The statute in that case was construed as a shield to the patient and not to the guilty.

§ 15. *Protection of "information" extends to a physician's assistants.*—A reasonable construction of the statutes would

extend it to protect "information" obtained by those who may be called in to consult with the patient's regular physician or surgeon, and to such other persons as may be required to assist him in the discharge of his professional duty. The rule in this respect should be the same as in case of protected communications by a client to his attorney: See *ante*, § 8; *Reniham v. Dennin*, *supra*.

III. TO CLERGYMEN.

§ 16. *Confessions to clergymen not protected at common law.*—At common law a confession made to a clergyman or priest is not protected, and he may be required to testify to it as a witness in any civil or criminal proceeding, although it has been said that the law of England encourages the penitent to confess his sins, "for the unburthening of his conscience, and to receive spiritual consolation and ease of mind." The law in this respect was, perhaps, generally regarded as unjust and against public policy, and it was urged that such communications should be protected in the interests of religion, so "that the guilty conscience may with safety disburden itself by penitential confessions, and by spiritual advice, instruction, and discipline seek pardon and relief."

§ 17. *Protected by statutes.*—In accordance with the public sentiment and policy referred to, there have been enacted in various States statutes protecting confessions made to priests and clergymen in their professional character: the statutes are given in full at the close of this article.

§ 18. *Conditions of protection.*—In order that a confession may be protected under the New York and other similar statutes, it is essential that the person to whom the confession is made be a clergyman or minister, and that it be made to him in his professional character. If not so made, it would not be protected: *People v. Gates* (1885), 18 Wend. (N. Y.) 311. The minister or priest must be one in fact. One appointed to such an office, in accordance with the rules and regulations of the religious organization or body to which he belongs, and exercising the functions of the office, would come within the statute. But it is probable that this would not be required in all cases. It will be observed that the statute in respect to

clergymen is not so specific as it is in respect to attorneys and physicians. We have observed that the statutes provide that confidential communications made by a client to "an attorney or counsellor-at-law" are protected, and that they mean such persons as are legally authorized to practise as such: *Ante*, §§ 1, 2, 3. The statutes on this subject relating to physicians and surgeons embrace only those who are "duly authorized to practise physic or surgery:" *Ante*, § 10. Those under consideration embrace "clergymen or other ministers of any religion." It is quite probable that this would be regarded as covering all who act in that capacity, and one recognized as such by any religious body or class of people, even though they may be, comparatively speaking, insignificant.

G. W. FIELD.

IV. STATUTORY PROVISIONS.

Arizona Revised Statutes of 1887, p. 818, provide that in criminal proceedings—

§ 2039. 2. An attorney or counsellor shall not, without the consent of his client, be examined as a witness as to any communication made by the client to him, or his advice given thereon, in the course of professional employment.

3. A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

In civil actions, the Compiled Laws of 1877, pp. 469, 470, included the above provisions, and also a similar provision for "licensed physicians or surgeons," but these provisions were repealed by the Revised Statutes, and in lieu, "the common law of England as now practised and understood," was restored: § 1862, title xxv., ch. 4, sec. 38.

Arkansas Digest of Statutes, 1883, p. 625, gives the following laws—

§ 2859. The following persons shall be incompetent to testify :

* * * * *Fifth*. An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent.

§ 2861. No minister of the gospel or priest of any denomination shall be compelled to testify in relation to any confession made to him in his professional character, in the course of discipline enjoined by the rules, or practice of such denomination.

§ 2862. No person authorized to practise physic or surgery shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional character, and which information was necessary to enable him to prescribe as a physician or do any act for him as a surgeon.

California Code of Civil Procedure, 1885, § 1881, declares, as to attorneys and clergymen, in identical words with the Arizona statute above cited, save the words "as a witness," and "cannot" for "shall not," and proceeds—

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

The same rules apply to criminal cases: Penal Code, § 1102.

Colorado General Statutes, 1888, pp. 1062-3, provide—

§ 9. 2. An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional employment.

3. A clergyman or priest shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A physician or surgeon duly authorized to practise his profession under the laws of this State shall not, without the consent of his patient, be examined as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

Dakota Compiled Laws, 1887, p. 910, § 5313, literally the same as the Colorado statute, except "cannot" is substituted for "shall not," and the words "duly authorized to practise his profession under the laws of this State," are omitted, thus agreeing with the statutes of Arizona and California.

Georgia Code, 1882, p. 987, provides—

§ 3797. There are certain admissions and communications excluded from public policy. Among these are * * * 2. Between attorney and client. * * *

§ 3798. Communications to any attorney or his clerk, to be transmitted to the attorney pending his employment, or in anticipation thereof, shall never be heard by the Court. So the attorney cannot be compelled to disclose the advice or counsel he may give to his client, nor to produce or deliver up the

title-deeds or other papers, except evidences of debt left in his possession by his client. This rule does not exclude the attorney as a witness to any facts which may transpire in connection with his employment.

Idaho Revised Statutes, 1887, p. 679, literally the same as the California statute, except the word "licensed" is omitted.

Indiana Revised Statutes, 1881 (edition of 1888 embracing all general laws subsequent to the revision), provide in criminal cases (§ 1796) and also in civil—

§ 497. The following persons shall not be competent witnesses:—

Third. Attorneys, as to confidential communications made to them in the course of their professional business and as to advice given in such cases.

Fourth. Physicians, as to matter communicated to them as such by patients in the course of their professional business or advice given in such cases.

Fifth. Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches.

Iowa Revised Code, 1884, p. 860, provides—

§ 3643. No practising attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same are made waives the rights conferred.

Kansas Compiled Laws, 1885, p. 645, provide—

(4133) § 323. The following persons shall be incompetent to testify:—

Fourth. An attorney, concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent.

Fifth. A clergyman or priest, concerning any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.

Sixth. A physician or surgeon, concerning any communication made to him by his patient, with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient: *Provided*, That if a person offer himself as a witness, that is to be deemed a consent to the examination; also, if an attorney, clergyman or priest, physician or surgeon, on the same subject, within the meaning of the last three subdivisions of this section (*sic*).

Michigan General Statutes, 1882, pp. 1889–90, provide—

§ 7515. Sec. 85. Chap. 262. No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.

§ 7516. Sec. 86. No person duly authorized to practise physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon.

Minnesota General Statutes, 1881, p. 792, chap. 78, title 1, § 10, literally the same as the California statute, except "a regular physician or surgeon" is used in place of "a licensed," etc.

Missouri Revised Statutes, 1879, p. 690, declare—

§ 4017. The following persons shall be incompetent to testify: * * * *
third, an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client; fourth, a minister of the gospel, or priest of any denomination, concerning a confession made to him in his professional character in the course of discipline enjoined by the rules of practice of such denomination; fifth, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.

Montana Compiled Statutes, 1887, p. 280, Civil Code, § 650, provide in the same words as the California statute, *supra*. These provisions are applicable to criminal trials: *Id.* p. 459, Criminal Code, § 294.

Nebraska Compiled Statutes, 1885, provide—

Sec. 328. Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: * * * * *Fourth.* An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent in open Court or in writing produced in Court. *Fifth.* A clergyman or priest, concerning any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.

Nevada General Statutes, 1885, p. 838, provide—

§ 3404. Sec. 382. An attorney or counsellor shall not, without the consent of his client, be examined as a witness as to any communication made by the client to him, or his advice given thereon, in the course of professional employment.

§ 3406. Sec. 383. A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

§ 3406. Sec. 384. A licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient: *Provided*, however, in any suit or prosecution against a physician or surgeon for malpractice, if the patient or party suing or prosecuting shall require or give such consent, and any such witness shall give testimony, then such physician or surgeon, defendant, may call any other physicians or surgeons, as witnesses on behalf of defendant, without the consent of such patient or party suing or prosecuting.

New York Code of Civil Procedure (4 Rev. Stat. 1882, p. 164) declares:

§ 833. A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs.

§ 834. A person duly authorized to practise physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity.

§ 835. An attorney or counsellor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment.

§ 836. The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or the client.

Ohio Revised Statutes, 1884, p. 1096, provide—

§ 5241. The following persons shall not testify in certain respects:—

1. An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same subject.

2. A clergyman or priest, concerning a confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

Oregon General Laws, 1872, p. 251, literally the same as California, except “shall not” for “cannot.”

Pennsylvania enacted, 1887 (P. L. 158, §§ 2, 5), that in any civil or criminal proceeding before any tribunal—

(d) Nor shall counsel be competent or permitted to testify to confidential communications made to him by his client, or the client be compelled to disclose the same, unless in either case this privilege be waived upon the trial by the client.

Tennessee Code, 1884, p. 897, declares—

§ 4748. No attorney or counsel shall be permitted, in giving testimony against a client, or person who consulted him professionally, to disclose any communication made to him as attorney by such person, during the pendency of a suit, before or afterwards, to his injury.

§ 4750. Any attorney offering to give testimony in any of the cases provided for in the two preceding sections shall be rejected by the Court, and is guilty of a misdemeanor, for which, on conviction, he shall be fined not exceeding one thousand dollars, to be assessed by the jury, and imprisoned not exceeding two years, and if a practising attorney shall also be stricken from the rolls.

Texas Revised Penal Code, 1888, p. 219, declares—

§ 2439. Art. 733. All other persons except those enumerated in articles 730 and 735, whatever may be the relationship between the defendant and witness, are competent to testify, except an attorney-at-law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship.

Utah Compiled Laws, 1876, p. 506, literally the same as the Nevada statute, *supra*.

Washington Territory Code, 1881, p. 102, provides—

Sec. 392. The following persons shall not be examined as witnesses: (then clauses 2, 3, and 4, literally as the California statute, except the words "shall not" for "cannot.")

Wisconsin Revised Statutes, 1878, p. 992, provide—

§ 4074. A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs, without consent thereto by the party confessing.

§ 4075. No person duly authorized to practise physic or surgery shall be compelled to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.

§ 4076. An attorney or counsellor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment.

Wyoming Revised Statutes, 1887, p. 590, § 2589, literally the same as the Ohio Statute, *supra*.

JOHN B. UHLE.

THE ELEMENT OF LOCALITY IN THE LAW OF CRIMINAL JURISDICTION.

THE Federal Courts have no common law criminal jurisdiction. The question was raised in the United States Circuit Court for the District of Pennsylvania, in 1798, in *United States v. Worrall*, 2 Dallas, 384, and the Court was equally divided in opinion. In 1818, Mr. Justice STORY, in *United States v. Coolidge*, 1 Gallison, 488, decided that there were common law offences against the United States. But this, as we shall see, was overruled by the Supreme Court. As early as 1807, Chief Justice MARSHALL, in *Ex parte Bollman*, 4 Cranch, 75, had said, "This Court disclaims all jurisdiction not given by the Constitution, or by the laws of the United States. Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." This was a statement of general doctrine, and it remained for the Court to make an application of the principle to the matter we are discussing, in 1812, in *United States v. Hudson*, 7 Cranch, 32, where it was decided that the Courts of the United States have no common law jurisdiction in criminal cases, the Court remarking that, "although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion." But in 1816 the question was again presented and similarly ruled on, although it appears that a difference of opinion existed at that time among the members of the Court: *United States v. Coolidge*, 1 Wheaton, 415. Whatever doubt may, at one time, have existed on this subject, it is now settled beyond controversy, that the Federal government has no common law jurisdiction of criminal matters: *United States v. Lancaster*, 2 McLean, 481, 483 (1841); *United States v. Taylor*, 1 Hughes, 514, 518 (1874); *United States v. Shepherd*, Id. 520, 522 (1875).

The Constitution of the United States, in its first Article

and eighth section, declares that the Congress shall have power "to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations." In accordance with the power thus conferred, the government has declared that certain acts done on "the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State," shall be crimes against the United States, and punishable in its Courts: Revised Statutes of the United States, Title LXX., ch. 3. A ship on the high seas is a floating part of the territory of the State to which it belongs: *Ex parte Byers*, U. S. Dist. Ct. E. Dist. Mich., 32 Fed. R. 404, 410 (1887). But when a merchant vessel of one country enters the ports of another, for the purposes of trade, it subjects itself to the law of the place to which it goes, and the Courts of that country can punish crimes committed on such foreign ships: *Wildenhus' Case*, 120 U. S. 1 (1886).

The law as to crimes committed on the Great Lakes has not been in all respects satisfactory. Under the power "to regulate commerce with foreign nations and among the several States," the Congress has undoubted authority to protect the lives and property of persons navigating those waters, but the failure to exercise the power has led to a denial of justice in important cases. This subject was recently before the District Court of the United States for the Eastern District of Michigan, in the case of *Ex parte Byers, supra*. In that case Mr. Justice BROWN was of the opinion that the State Courts had at that time exclusive jurisdiction of crimes committed on the lakes, and their connecting waters, upon the American side of the boundary line, Congress not having enacted any law as to offences committed in such waters. And he was also of the opinion, that the Federal Courts had no jurisdiction over a crime committed upon the Canadian side of such waters, holding that the Great Lakes and their connecting waters were not included within the words used in the Revised Statutes of the United States, conferring jurisdiction on the Federal Courts, that is, the words "high seas, or river, haven,

creek, basin, or bay, within the admiralty jurisdiction of the United States." He said: "That the lakes are not 'high seas' is too clear for argument. These words have been employed from time immemorial to designate the ocean below low water-mark, and have rarely, if ever, been applied to interior or land-locked waters of any description. * * * Now, it seems incredible, that, if Congress had designed to extend the Act of 1790 to the Great Lakes, a series of waters entirely separate, distinct and distant from the high seas and their connection, it should not at least have inserted the word 'lakes,' or have used the still more explicit language to designate those interior waters. The words 'haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State,' following the words 'high seas,' seem to me clearly to be such as are connected immediately with the high seas, and to be much the same as the words 'arm of the sea,' in the same section. While the word 'river' may be properly used to designate the straits which connect Lake Huron and Lake Erie, it would be little short of absurd to impute to Congress the intent to give criminal jurisdiction to those rivers, and not to the lakes from and into which they flow." The Court therefore reluctantly ordered the discharge of the prisoner, who had committed a crime on the Canadian side of the straits connecting the waters of Lake Erie and Lake Huron.

It is provided in section 3 of Article IV. of the Constitution of the United States, that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Under this provision Congress has unquestionably full power to govern the Territories, and it may enact such laws, and establish such criminal and civil codes for the protection of life and property within the Territories, as in its wisdom shall seem desirable. But when Congress admits a Territory to Statehood, the Federal government loses this power of legislation, and its right of jurisdiction over criminal offences becomes transferred to the State itself. This admission of the State does not divest the United States of its title to any of the public lands situated within

the State limits, but its jurisdiction over those lands is as completely gone as it is over the lands owned by private persons situated within the same State limits. Thus in *United States v. Stahl*, 1 Woolworth, C. C. 192 (1868), a crime had been committed on land within the boundaries of the State of Kansas, the fee of the land having been in the government of the United States prior to the organization of Kansas into a Territory, and it had ever since so continued. Mr. Justice MILLER held that the Federal Courts had no jurisdiction over the offence; that in admitting Kansas into the Union, the government of the United States became divested, not of its title to the soil in question, but of its jurisdiction over the same.

Of course, the same principle must be applied in the case of crimes committed on land to which the United States becomes entitled after the admission of the State. The jurisdiction of the State having once attached to the soil in question, cannot be taken away from it by the mere subsequent purchase of the land by the United States: *United States v. Penn*, 4 Hughes, 491 (1880); where it was held that the Federal Courts were without jurisdiction of offences committed in the National Cemetery, on the heights of the Potomac, opposite Washington.

The Constitution, however, provides that Congress shall exercise exclusive legislation "over all places *purchased by the consent of the Legislature of the State*, in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Under this provision the State Courts are deprived of jurisdiction over offences committed in the places above enumerated, the jurisdiction being dependent on the laws of the United States, and not at all on those of the State. The question was raised in 1884 in the Supreme Court of Maine, in *State v. Kelly*, 76 Me. 331. A mortal blow or wound had been inflicted within a fort belonging to the United States, within the boundaries of Maine. The injured person died outside the fort, but within the State of Maine, and the person who inflicted the wound was indicted in the State Courts. The Court held that the crime was committed when the blow was struck, and not when the

person died, and that therefore the Courts of the United States had jurisdiction over the offence, and that their jurisdiction was exclusive of that of the State. And it was further held that a State statute, declaring that the Courts of a county in which a person should die of a mortal wound elsewhere received, should have jurisdiction of the offence, was wholly inapplicable to the case of one whose mortal wound was received within a fort of the United States. And see *Commonwealth v. Clary*, 8 Mass. 72 (1811).

However, the mere fact that a place is owned and occupied by the United States as a fort, arsenal, magazine, etc., does not necessarily give to the United States jurisdiction over offences therein committed. Where a place occupied by the United States for military, or other constitutional purposes, is located within a State, but has not been reserved by the United States in the organic Act, or in the Act admitting the territory into the Union, and where there has been no cession of such place by the State to the United States, the State Courts, and not the Federal Courts, have jurisdiction over crimes committed therein. And this is so though the place may have been constantly occupied and used by the United States, whether under purchase or without purchase. The question was presented to the Supreme Court of New York in 1819 in *People v. Godfrey*, 17 Johnson, 225. The defendant had been convicted of murder, committed within the walls of Fort Niagara. The prisoner and the deceased were fellow soldiers in the army of the United States, and the deceased, for some military offence, was under the custody of the accused in the "black hole," when the latter stabbed him with a bayonet, causing his death. The prisoner was placed on trial in the State Court, and claimed that the Federal Courts alone had jurisdiction over his offence, as having been committed within a fort of the United States. It appeared that Fort Niagara was captured from the French in 1759, and passed, by virtue of the treaty of peace of 1763, to the Crown of Great Britain, and that it continued to be held by that power, as a fortress, until it was surrendered under the treaty of 1794, since which time it had been possessed and garrisoned by the United States. It was within the acknow-

ledged limits of the State of New York, and had never been formerly ceded by the State to the United States. The Supreme Court of the State of New York decided, Chief Justice SPENCER writing the opinion, that the State Courts had jurisdiction of the offence. They held that it was beyond all doubt that the United States acquired no territorial rights to any portion of the State of New York, in virtue of the treaties of 1783 and 1794, and that, when Great Britain, in accordance with these treaties, withdrew its garrisons from any place, it was for the benefit of the several States within whose limits the garrisons were. And they further held, that the occupation of the fort by the troops of the United States, since its evacuation by the British, could not be considered as evidence of a right in the general government to the post itself, nor as an act hostile to the rights of the State of New York. A somewhat similar question came before the Supreme Court of Kansas, in respect to a crime committed on the military reservation at Fort Leavenworth. That reservation had been acquired by the United States as a part of the Territory of Louisiana, and had been used for military purposes. But in the organic Act, and in the Act admitting the Territory as a State, there had been no reservation of jurisdiction over the soil in question. And there never had been any cession of the property by the State to the United States. It was accordingly held in *Clay v. State*, 4 Kansas, 49 (1866), that the State Courts had jurisdiction of the offence of larceny committed within Fort Leavenworth.

The question of jurisdiction over offences committed upon Indian Reservations has been before the Courts in a number of cases. The principle has been laid down that when a Territory is admitted as a State, without any reservation in the enabling or organic Act, the Federal Courts have no jurisdiction over offences committed within what are known as Indian Reservations. Thus in *United States v. Ward*, 1 Woolworth C. C. 17 (1863), a white man had been indicted for the murder of a white man committed on an Indian Reservation in Kansas, and it was held that the Federal Courts were without jurisdiction. And on a similar state of facts, the State Courts of Nebraska held that they had jurisdiction over an

offence committed by one white man on another, within an Indian Reservation in that State: *Marion v. State*, 16 Neb. 358 (1884); s. c. 20 Id. 238, 247 (1886). In the above cases, the crimes were committed by white men upon white men. There is, however, no question but that the State can punish its own citizens for crimes committed on such territory against the Indians. See *U. S. v. Cinsa*, 1 McLean, 254, 268 (1835). Of course, if the United States, in the organic or enabling Act, admitting the State to the Union, reserved its jurisdiction over the Indian Reservations, within the outside boundaries of such State, the jurisdiction over offences committed in such places would, unquestionably, be in the United States Courts. See *United States v. Rogers*, 4 How. (U. S.) 567, 572 (1846). When, however, the State comes in without any such restrictions or reservations, it has been held to have the right to extend its criminal laws over Indians living on the Reservations: *State v. Foreman*, 8 Yerger (Tenn.), 256 (1835); *State v. Tassels*, Dudley (Ga.), 229 (1830); *State v. Ta-cha-na-tah*, 64 N. C. 614 (1870); *State v. Dextater*, 47 Wis. 278 (1879); *State v. McKenney*, 18 Nev. 182 (1883). In the case last above cited, it was decided that while the State had the right to extend its criminal laws over Indians living in tribal relations on Reservations, yet State laws do not apply to them unless they are so expressed. And it was held that the State Courts of Nevada had no jurisdiction over an offence committed by an Indian on an Indian, both of whom were members of an organized tribe, living on a Reservation, and having laws for the government of their internal affairs. But the Supreme Court of the United States has recently made a very important decision on the subject we are now considering. In *United States v. Kagama*, 118 U. S. 375 (1886), that Court decides, Mr. Justice MILLER writing the opinion, that Congress can constitutionally pass a law, making it a crime for one Indian to commit murder upon another Indian, upon an Indian Reservation, situated wholly within the limits of a State, and making the Indian so offending subject to be tried in the same Courts and in the same manner and subject to the same penalties as are all other persons committing the crime of murder "within the exclu-

sive jurisdiction of the United States." It had previously been held that Congress, in the exercise of its constitutional power to regulate intercourse with the Indian tribes, might define and punish crimes committed by white men upon the person or property of an Indian, and *vice versa*, within as well as without the limits of a State: *United States v. Martin*, 8 Sawyer, 478 (1888); *United States v. Bridleman*, 7 Id. 243 (1881). But the decision of the Supreme Court of the United States, above referred to, is placed on the broad ground that the Indians are the wards of the United States and that the government has the right to protect them.

We have hitherto considered crimes committed on Indian Reservations. But a word must be added as to crimes committed by Indians off their Reservations. It has been decided that United States Courts have no jurisdiction over Indians, living on Indian Reservations, who commit crimes on white men, while off their Reservations. The Courts of the State in which the crime is committed, have jurisdiction in such cases: *United States v. Yellow Sun*, 1 Dillon, 271 (1870). And to the same point, see *United States v. Sacoodacot*, 1 Abbott (U. S. C. C.) 877 (1870).

Each State possesses exclusive power to provide for the punishment of offences within its own limits, except in so far as its power may have been surrendered to the government of the United States by the Federal Constitution: *State v. Chapman*, 17 Ark. 561, 565 (1856). And within the State, crimes must be tried in the county in which the criminal act was committed: *State v. Wyckoff*, 31 N. J. L. 65, 68 (1864).

It is a very old rule of the common law that requires every offence tried in the common law Courts, to be inquired of in the county where the act took place. The peculiar character of the early jury affords an explanation and reason for the rule. Jurors were originally witnesses as well as triers, and were expected to act upon their own knowledge of the facts involved, and of the character of the witnesses on either side. But when they became simply triers of fact, the rule was already firmly established, and it was seen that there were marked and strong advantages in selecting the jurors from the county in which the crime had been committed. It would

be a great burden and injustice, if a man could be carried to a distant part of the State and compelled there to make his defence at a distance from the place in which the act complained of occurred. And so the old rule was retained, even after the original reason for its existence had ceased. The same principle is observed in the criminal jurisdiction of the Federal government. For the judicial purposes of that government, the States are not divided into counties, but are organized into districts. In some of the States there is but one judicial district, while in others there are two or more of them. And the sixth amendment to the Constitution of the United States declares that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and *district* wherein the crime shall have been committed." The denial of the right to a trial by a jury of the vicinage is one of the causes which led to a separation from the mother country. The Declaration of Independence arraigns George III. : "For transporting us beyond seas, to be tried for pretended offences."

Personal presence at the place where the crime is perpetrated, or even within the State where the crime is committed, is not always indispensable to confer jurisdiction on the Courts of such place or State. For while the offender may not be corporally present, he may be there by the instrument or agent used to effect his purpose. If a person outside the State acts within the State through an innocent agent, he is amenable to the law of the State. Thus in *Barkhamsted v. Parsons*, 3 Conn. 1, 8 (1819), it is said: "The principle of common law, *qui facit per alium, facit per se*, is of universal application, both in criminal and civil cases, and he who does an act in this State by his agent, is considered as if he had done it in his own proper person." And so in *The People v. Adams*, 3 Denio, 190, 210 (1846), where it is said: "True, the defendant was not personally within this State, but he was here in purpose and design, and acted by his authorized agents. *Qui facit per alium, facit per se*. The agents employed were innocent, and he alone was guilty. An offence was thus committed, and there must have been a guilty offender, for it would be somewhat worse than absurd to hold

that any act could be a crime, if no one was criminal. Here the crime was perpetrated within this State, and over that our Courts have an undoubted jurisdiction. This necessarily gives to them jurisdiction over the criminal. *Crimen trahit personam.*"

When one is guilty only as an accessory before the fact, the rule has been that he can only be tried in the place where his guilty act of accessoryship took place. Thus, when several persons entered into a conspiracy in Ohio to burn a steamboat, and the boat was burned in Arkansas, the Supreme Court of the latter State held that one of the confederates, who had remained in Ohio and was simply an accessory before the fact, could not be tried in the Courts of Arkansas: *State v. Chapin*, 17 Ark. 561 (1856). And so when the accused made arrangements in New York with a confederate to go into New Jersey and steal certain property, which the latter did, the former remaining in New York, it was held that the former, being simply an accessory before the fact, could not be tried in the Courts of New Jersey: *State v. Wyckoff*, *supra*. And other cases there are to the same effect: *Johns v. State*, 19 Ind. 421 (1862); *State v. Moore*, 26 N. H. 448 (1853). This doctrine was repudiated by the Supreme Court of Connecticut, in *State v. Grady*, 34 Conn. 118 (1867). The defendants conspired, with certain accomplices, in the city of New York, to commit the crime of larceny in the State of Connecticut, and the larceny was accordingly committed. It was claimed as to certain of the defendants, that the Connecticut Court had no jurisdiction to try them, notwithstanding they had assisted in the initiation of the plot in New York, inasmuch as they did not come into the State and assist personally in the commission of the crime. But it was held that the Court might punish their offence, having obtained jurisdiction of their person. As the question is quite important, it may be well to notice the grounds upon which the conclusion was based. The Court say: "The general proposition that no man is to suffer criminally for what he *does* out of the territorial limits of the country, if applied to a case where the act is completed out of the country, is correct; but it is the highest injustice that a man should be protected in

doing a criminal act here, because he is personally out of the State. His *act* is here, although he is not. * * * The reason given for the distinction is, that, if the offence is a felony, he sustains the relation to it, if performed by a guilty agent who can be punished, of an accessory, and not of a principal, and that, as technically an accessory, he must be pursued in the locality where he committed the enticement. The doctrine has never been recognized in this State, is inconsistent with our system of criminal law, and does not commend itself to our judgment. In the first place, it has not been recognized here. There has been no case in our Courts where the prisoner has been indicted and acquitted, because, although a party to the offence, he was not in the State at the time it was committed. * * * In the second place, the doctrine is inconsistent with our system of criminal law. By express statutory provision we have done away with the distinction between principal and accessory in felony: and every person who aids and assists in the commission of a crime, or the protection of a criminal, is made a principal, and punishable and indictable as such. * * * And in the third place, the doctrine, as applicable to this country, is vicious, and should be repudiated. It originated, as Mr. Bishop tells us, in the blunder of some judge. * * * The blunder was corrected by the statute of Edward VI., Chap. 24, §4, which provided that such accessory might also be indicted in the county where the offence was committed. It would seem that a rule thus originating in a blunder, and applicable only in respect to counties in the State where the offence is committed, and corrected by express statute, and favoring the commission of crime, ought not to be adopted and applied to States situated as these are, tied together by a ligament giving to the citizens of each, citizenship in all." And see *State v. Ayers*, 8 Baxter (Tenn.) 96 (1874).

It is not within our purpose to discuss the question of who is an accessory before the fact, and who is not. But we cannot forbear in this connection calling attention to the interesting case of *State v. Hamilton*, 13 Nev. 386 (1878). Certain persons had conspired to rob a stage on its way from Eureka in Eureka County, to a place in Nye County in the

same State of Nevada. One of the confederates was to remain at Eureka and make a signal to his confederates in Nye County, some forty miles distant, when the stage left Eureka, the signal being given by building a fire on the top of a mountain. And the question was whether this confederate, whose act was performed in Eureka County, he having built the fire as agreed, could be held in Nye County for an attempt to rob there, he not having been present in the latter county when his confederates attacked the stage. And it was decided that he might be tried in Nye County, not as an accessory before the fact, but as a principal, the law being that when several persons confederate together for the purpose of committing a crime, which is to be accomplished in pursuance of a common plan, all who do any act which contributes to the accomplishment of their design, are principals, whether actually present or not.

According to the common law, the crime of bigamy occurs and is complete at the time and place when the second marriage is accomplished. The offence consists in going through the ceremony of marriage. That single fact constitutes the crime, and not the subsequent cohabitation: *Gise v. Commonwealth*, 81 Pa. 428 (1876). The result is that an indictment for bigamy must be found in the county and State in which the bigamous marriage was entered into. Thus in *Walls v. The State*, 32 Ark. 565 (1877), the second marriage was contracted in the county of Woodruff, Arkansas, and the indictment for bigamy was found in Jackson County in the same State. This indictment was based on a statute which allowed the person to be tried for bigamy in any county where he was apprehended, and this law was held unconstitutional. The Court ruled that an indictment for bigamy could only be found in the county where the bigamous marriage was celebrated.

In cases of homicide, where the blow was struck in one county and death resulted therefrom in a different county, there seems in early times to have been some doubt as to the proper place of trial. East declares that the common opinion was that the criminal might be indicted where the stroke was given, no matter where the death took place: 1 East P.

C. 361. But, whatever of doubt may have existed, it is now very well settled by the weight of authority that the crime of murder is committed when the blow is struck, irrespective of the place where the death occurs: *State v. Gessert*, 21 Minn. 369 (1865); *Commonwealth v. Parker*, 2 Pick. (Mass.) 550 (1824); *State v. Bowen*, 16 Kans. 475, 479 (1876); *Riley v. State*, 9 Humph. (Tenn.) 646 (1849); *United States v. Guiteau*, 1 Mackey, D. C. 498; *Green v. State*, 66 Ala. 40 (1880). And see *State v. McCoy*, 8 Rob. R. (La.) 545 (1844); *State v. Foster*, 7 La. Ann. 255 (1852). In the first of the cases cited, the blow was inflicted in Minnesota and death took place in Wisconsin. The Minnesota Court held that it had jurisdiction over the offence; that the death in Wisconsin was not the act of the accused committed in Wisconsin, but the consequence of his act committed in Minnesota, against the peace and dignity of the latter State.

In *United States v. Davis*, 2 Sumner (U. S. C. C.) 482, an American sailor in an American ship in one of the Society Islands harbors fired a shot, which killed a man in a foreign ship. The Court, Mr. Justice STORY, held that the murder was committed when the blow was struck, and as the deceased was struck while on a foreign ship, our Courts had no jurisdiction over the offence.

So, when a person standing on one side of a boundary line fires across the same and kills a man standing in another State, the murder is committed in the latter State, when the shot takes effect: *State v. Chapin*, 17 Ark. 561, 565 (1856); *State v. Wyckoff*, *supra*; *State v. Carter*, 27 N. J. L. 499 (1859).

Some of the States have enacted that, if a mortal wound is inflicted outside the State and death ensues therefrom within the State, the offence may be prosecuted and punished in the county within the State, wherein such death may take place. The constitutionality of a statute of this kind was called in question in *Tyler v. People*, 8 Mich. 321 (1860), and it was said to be "clearly within the scope of the legislative power." But the opinion does not discuss the matter at any length, although the subject is extensively considered in a dissenting opinion of one of the justices, who found himself unable to

acquiesce in the conclusion reached by the Court. The same question was afterwards presented to the Supreme Court of Massachusetts in *Commonwealth v. Macloon*, 101 Mass. 1 (1869). The matter was carefully considered and a like conclusion was reached, the constitutionality of the Act being upheld. The contrary doctrine was asserted in New Jersey in *The State v. Carter*, 3 Dutcher, 499 (1859). But see *Hunter v. The State*, 40 N. J. L. 495 (1878), and *Queen v. Lewis*, 7 Cox C. C. 277 (1857).

Many of the States have provided by statute, that, when the commission of an offence is commenced within the State, but is consummated without its boundaries, the offender is liable to punishment within the State, and that the county in which the offence is commenced, shall have jurisdiction thereof. The validity of such a statute was called in question in *Green v. State*, 66 Ala. 40 (1880), on the ground that its enactment was beyond the scope of legitimate legislative power, as the penal laws of a State could not operate beyond its own territorial domain. The objection was held untenable and the statute sustained. In that case, a mortal wound was inflicted in Alabama and death occurred in Georgia, and it was held that the offender might, under this statute, be properly convicted of murder in Alabama, irrespective of the common law rule that murder is committed when the blow is struck, irrespective of the place of death.

In the law of larceny, the principle is well established that, if one steals goods in one county and carries them into a second county in the same State, he may be indicted for the theft in either county: *State v. Douglas*, 17 Me. 193 (1840); *Commonwealth v. Cullins*, 1 Mass. 116 (1804); *Commonwealth v. Dewitt*, 10 Id. 154 (1813); *State v. Somerville*, 21 Me. 14, 19 (1842); *Myers v. The People*, 26 Ill. 178, 177 (1861); *State v. Margerum*, 9 Baxter (Tenn.), 362 (1878); *The People v. Burke*, 11 Wend. (N. Y.) 129, 180 (1834).

But this is no contradiction of the principle that a crime is to be punished in the county where it was committed. The indictment in the second county is for the larceny committed in that county, and not for that which was committed in the first county. The legal possession of goods stolen continues

in the owner, and every moment's continuance of the trespass is said to amount in legal contemplation to a new caption and asportation. Hence the *venue* may be laid in any county in the State into which the thief conveys them, as the offence of taking and converting is there in itself complete. Some of the earlier American decisions decline to apply this principle when goods have been stolen in one State and carried by the thief into another State. They have held that under such circumstances the thief could not be indicted for larceny in the latter State: *Simpson v. The State*, 4 Humph. (Tenn.), 456 (1844); *People v. Gardner*, 2 Johnson (N. Y.) 477 (1807); *Simmons v. Commonwealth*, 5 Binney (Pa.), 618 (1813); *State v. Brown*, 1 Haywood (N. C.), 100. The first of these cases was afterwards, in 1834, disapproved by Mr. Chief-Justice SAVAGE in *People v. Burke*, 11 Wend. (N. Y.) 129. And later cases hold that the thief may be convicted of the larceny in any State into which he takes the goods: *Hamilton v. State*, 11 Ohio, 435 (1842); *State v. Bennett*, 14 Iowa, 482 (1863); *State v. Johnson*, 2 Oregon, 115 (1864); *Watson v. State*, 36 Miss. 593 (1859); *State v. Ellis*, 3 Conn. 187 (1819); *Terrill v. Commonwealth*, 1 Duval, 156 (1864); *State v. Underwood*, 49 Me. 181 (1858); *Commonwealth v. Andrews*, 2 Mass. 14, 24 (1806); *Commonwealth v. Holder*, 9 Gray (Mass.), 7 (1857); *Commonwealth v. White*, 123 Mass. 433 (1877); *Worthington v. State*, 58 Md. 403 (1882); *Commonwealth v. Cullins*, 1 Mass. 186 (1804); *State v. Hill*, 19 S. C. 435 (1883).

It has been argued that the rule which is applied, as between counties of the same State, as well as between the commonwealths in the American Union, ought not to be applied where the goods have been stolen in some foreign country and brought into one of our States. In *Commonwealth v. Uprichard*, 3 Gray (Mass.), 434 (1855), such a distinction was recognized, and it was decided that an indictment could not be sustained for a larceny in Massachusetts of goods stolen in the Province of Nova Scotia and brought from there by the thief to Boston. This distinction was held not to exist in *The State v. Bartlett*, 11 Vermont, 650, 653 (1839), and it was decided that when oxen were stolen in Canada, and by the thief brought into Vermont, he could be indicted

and convicted in the latter State. And the Massachusetts ruling was repudiated in *State v. Underwood*, 49 Me. 181 (1858), where a verdict was sustained for larceny against one who stole the goods in the Province of New Brunswick and carried them into the State of Maine.

In some States statutes have been passed governing the matter above discussed, and in some cases the Courts have been required to pass on the constitutionality of their provisions. Such a question was presented in *The People v. Williams*, 24 Mich. 157 (1871). The statute provided as follows: "Every person who shall feloniously steal the property of another, in any other State or country, and shall bring the same into this State, may be convicted and punished in the same manner as if such larceny had been committed in this State," etc. The goods in question had been stolen in Louisiana and brought into Michigan. Mr. Justice COOLEY, in writing the opinion sustaining the statute, said: "Now, it may be true that this wrong would not have been an offence within this State at the common law; but that does not prevent its being made so by statute." The same Court in *Morrissey v. The People*, 11 Mich. 327 (1868), were equally divided in opinion as to whether the Legislature could constitutionally provide for the punishment in Michigan of persons who committed larceny in a *foreign* country and carried the stolen property into Michigan. The goods in that case had been stolen in Canada. The question involved in *Morrissey v. The People* was not discussed in the case of *The People v. Williams*, as the goods in the latter case were stolen in a sister State. But the constitutionality of a similar statute was sustained in New York, where money was stolen in Canada and brought by the thief into New York: *The People v. Burke*, *supra*.

In *State v. Johnson*, 38 Ark. 568 (1882), a statute declaring that a person who committed larceny in one county and then brought the stolen goods into another county, might be indicted in the latter county, was held not abrogated by a subsequent constitutional provision securing to the accused, in all criminal prosecutions, "the right to a speedy and public trial, by an impartial jury of the county in which the crime

shall have been committed." It was held that the crime was in fact committed in the second county as well as in the first county, as every moment's continuance of the trespass and felony amounted to a new caption and asportation.

It has been provided by statute in some of the States, that a person committing a burglary and larceny in one county, and carrying the stolen property into another county, may be indicted, tried, and convicted for the burglary in the latter county, as if the crime had been there committed. It is well known that at common law such a person could not have been convicted of burglary in the latter county, but only of the larceny, inasmuch as the breaking and entering essential to the crime of burglary occurred in the former county.

And the question has been raised under these statutes whether the Legislature has the power to take away the local character of the offence of burglary. Such a question was raised in *Mack v. The People*, 82 N. Y. 235 (1880). It was argued that the Bill of Rights secured the individual against a trial "unless on presentment or indictment of a grand jury," and that this meant a grand jury of the same county wherein the offence was committed. The Court of Appeals, in overruling the point, said: "Doubtless, at common law, the grand jurors were sworn *ad inquirendum pro corpore comitatus*, and could not regularly inquire of a fact done out of that county, for which they were sworn. * * * But by Act of Parliament they might be specially enabled so to do. * * * By all rules of interpretation, then, we are to read the language of the Bill of Rights in the light of the law as it was when the Bill of Rights was adopted. Then, though as a rule indictments could be preferred and tried only in the county where the offence was committed, there were exceptions to that rule of instances in which the Legislature had directed otherwise, and the Bill of Rights must be taken to have recognized that legislative power, and not to have intended the abrogation of it, as there is no indication in the language of a purpose so to do. It must be taken to have meant an accusation preferred by a grand jury, as authorized by law, present and future, common law or statutory."

Under such a statute as that above referred to, it is neces-

nary to allege in the indictment the facts which bring the case within the statute. If the burglary was committed in the county of A., and the goods carried into the county of B., an indictment found in the county of B., alleging simply that the burglary was committed in the county of A., would be bad, and, if it alleged that it was committed in the county of B., the evidence would show a variance. It would be necessary to allege that the burglary was committed in the county of A., and that the goods were brought by the offender into the county of B.: *Haskins v. The People*, 16 N. Y. 344 (1857).

In the law of libel, the rule is that, if a libel is published in a newspaper printed in one State and circulated in another, an indictment in the latter State will be sustained: *Commonwealth v. Blanding*, 8 Pick. (Mass.) 304 (1825). And it was held in *King v. Burdett*, 4 B. & Ald. 95 (1820), that a delivery at a post-office in the county of L. of a sealed letter, inclosing a libel, was a publication of the libel in L., and that where one wrote and published a libel in L., with the intent to publish, and afterwards published it in the county of M., the writer could be indicted in either county. And see the case of *The Seven Bishops*, 12 State Trials, 331 (1688).

In the law relating to the obtaining of goods by false pretences, the better opinion is that the offence is committed when the goods are obtained, no matter when the false representations may have been made. The making of false representations does not amount to a crime; the crime consists in obtaining the goods, the false pretences simply being a means employed to bring about that end. Hence, if the false pretences are made in one county and the goods obtained in a different county, the indictment should be in the latter county: *State v. House*, 55 Iowa, 472 (1881); *State v. Dennis*, 80 Mo. 589 (1888); *People v. Sully*, 5 Parker C. R. (N. Y.) 142 (1860); *People v. Rathbun*, 21 Wend. (N. Y.) 509, 538 (1839). And so is it, when the representations are made in one State and the goods obtained in another: *State v. Saeffer*, 89 Mo. 271 (1886); *Stewart v. Jessup*, 51 Ind. 413 (1875); *Commonwealth v. Van Tuyl*, 1 Met. (Ky.) 1 (1858).

In *Rex v. Lara*, 6 Term R. 565 (1796), it was announced that, if a man draws a check upon a bank with which he has no

money, and hands it as a good check to another party, it is a false pretence as regards that party, but not as regards the banker. It follows, therefore, that, if A., in Michigan draws a check on a bank in Pennsylvania in which he has no funds, and obtains the money on that check from a bank in Michigan, which thereafter receives the money on it from the Pennsylvania bank, the crime of obtaining money under false pretences has been committed in Michigan, and must be punished there, and not in Pennsylvania. Such a question came up *In re Carr*, 28 Kans. 1 (1882), and the above principle was applied. The same case also shows that, if A. in Michigan should draw a forged check on a bank in Pennsylvania, and the Michigan bank should pay it, and then send it on to Pennsylvania for collection, the forger would be amenable to the law of the former, and not to that of the latter State. But the case of *The People v. Adams*, 3 Denio (N. Y.), 190 (1846), shows that, if the Michigan bank, instead of paying the check, had taken it for collection as the agent of the forger, and as such actually received the money for the forger from the Pennsylvania bank, the forger would have been liable to indictment in the latter State for obtaining the money under false pretences. Where money or goods are sent by the owner by mail to one who has obtained the same by false representations, the offender should be indicted at the place where the money was mailed, as it is there that the owner of the property parts with his control over it: *Commonwealth v. Wood*, 142 Mass. 459, 462 (1886).

When a forged instrument is sent by mail from one county to an individual in another county, the crime of uttering and publishing it is not consummated until the paper is received by the person to whom it was sent. The proper place of trial, therefore, is in the county where the instrument is received, and not in the one in which it was mailed. *The People v. Rathbun*, *supra*, is an important case sustaining the above principle, the matter having been exhaustively considered by Mr. Justice COWEN. The accused had mailed in New York City a forged instrument to a party in Genesee County, in the same State, and it was held that the proper place of trial was in the county of Genesee, for the crime of uttering

and publishing the paper in question. And the same principle is applied when the instrument is mailed in one State to a person in another State. Such was the case in *Lindsay v. The State*, 38 Ohio St. 507 (1882). A forged deed was mailed in Missouri to a person in Ohio, where the land described in the deed was situated. It was held that the crime of uttering and publishing the forged paper was consummated in Ohio, where the paper was received, and not in Missouri, where it was mailed.

An Iowa statute on the subject of abortion provided as follows: "That any person who shall wilfully administer to any pregnant woman any medicine, drug, substance, or thing whatsoever, or shall use or employ any instrument or other means whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman, shall, upon conviction thereof, be punished," etc. It was held, under this statute, that the offence was complete when the medicine was administered, and that the jurisdiction over the offence was with the county wherein the medicine intended to produce the miscarriage was administered, and not with the county where the miscarriage took place: *The State v. Hollenbeck*, 36 Iowa, 112 (1872). In *Robbins v. State*, 8 Ohio St. 181, 164 (1857), it was held that the overt act of administering poison consisted not merely in prescribing or furnishing the poison, but also in directing and causing it to be taken; so that if the poison was prescribed and furnished in one county to a person who carried it into another county, and then, under the directions given, took it and became poisoned and died of the poison, the administering was consummated and the crime committed in the county where the person was poisoned.

HENRY WADE ROGERS.

Ann Arbor, Mich.

RECENT AMERICAN DECISION.

Court of Appeals of Kentucky.

HUTCHCRAFT'S EXECUTOR v. TRAVELERS' INS. CO. OF HARTFORD.

It is not essential, to make out a case of injury through external, violent, and accidental means, that the person injuring the insured did not mean to do so.

Where an accident insurance policy is expressed in general terms and specified things are excepted from the operation of the general terms, the latter are to be construed as covering all things coming within their scope, except those expressly excepted.

An exception, in an accident insurance policy, of intentional injuries inflicted by the insured or any other person, includes death by assassination for purposes of robbery, and no recovery can be had on the policy.

APPEAL from Bourbon Circuit Court.

William Lindsay and Russell Mann, for appellant.

James S. Pirtle, for appellee.

BENNETT, J. May 29, 1888. During the time that appellant's testator held two tickets of insurance in the appellee's company, insuring his life in the sum of \$3000 each against death "through external, violent, and accidental means," he was waylaid and assassinated for the purpose of robbery. The appellee interposed two defences to the appellant's action to recover these sums: First, that the appellant's testator having been killed by intentional "means," his death was not accidental within the meaning of the terms of the policy, which insured him against death "through external, violent, and accidental means;" second, that the proviso in the policy expressly exempted the appellee from liability in case the appellant's testator came to his death through injuries intentionally inflicted by another person. These defences will be disposed of in their order.

1. In each ticket the appellee covenanted to pay \$3000 to Hutchcraft's representative, if he should be killed "through external, violent, and accidental means." Accidents are of two kinds: First, those that befall a person without any human agency; as the killing of a person by lightning. Here the elemental properties of lightning and its flash are not

caused or controlled by human agency ; but the fact that the person was struck by unintentionally placing himself within its range is as to him an accident. Second, those that are the result of human agency. The latter are divided as follows : First, that which happens to a person by his own agency, as if he is walking or running, and accidentally falls and hurts himself. Here he falls by reason of his agency in walking or running, but he did not intend to fall. He did not foresee that he would fall in time to avoid it. The fall was therefore accidental. Second, that which befalls a person by the agency of another person, without the concurrence of the latter's will ; as where one standing on a scaffold unintentionally lets a brick fall from his hand, and it strikes a person below. Here the dropping of the brick, as it was not intended by the former, and was unforeseen by the latter, is in the broadest sense an accident. Third, that which a person intentionally does, whereby another is unintentionally injured ; as where one intentionally fires a gun in the air, and accidentally shoots another person. Here the act of firing the gun was intentional, but the shooting of the person was unintentional. Therefore, on the part of the person firing the gun, the shooting of the other would be accidental, though not in as broad a sense as in the former case, because some part of his act was intentional ; but as to the person shot, it was by purely accidental means. Fourth, so also, as we think, if one person intentionally injures another, which was not the result of a rencontre or the misconduct of the latter, but was unforeseen by him, such injury as to the latter, although intentionally inflicted by the former, would be accidental. When the injury is not the result of the misconduct or the participation of the injured party, but is unforeseen, it is as to him accidental, although inflicted intentionally by the other party. It is conceded that in the three instances first named the injury would be by accidental means. Nor doubtless will it be denied that, if a person were to maliciously fire his gun into a crowd of persons for the purpose of general mischief, or were to maliciously wreck a train of cars for the purpose of injuring whomever may be aboard, whereby one or more persons were shot or mashed, the casualty befalling

these persons, so far as they were concerned, would fall within the term of accidental means. In other words, we do not regard it as essential, in order to make out a case of injury by accidental means, so far as the injured party is concerned, that the party injuring him should not have meant to do so; for, if the injured party had no agency in bringing the injury on himself, and to him it was unforeseen—a casualty—it seems clear that the fact that the deed was wilfully directed against him would not militate against the proposition that as to him the injury was brought on by “accidental means.”

2. That part of the proviso that is germane to the second ground of defence is as follows: “And no claim shall be made under this ticket when the death or injury may have been caused by duelling, fighting, wrestling, lifting, or over-exertion, or by suicide (felonious or otherwise, sane or insane), or by intentional injuries inflicted by the insured, or any other person.” The fact that the insured engaged in a duel or fight, though forced upon him; the fact that he engaged in a wrestling match, however innocent; the fact that he engaged in lifting, though never so cautious; the fact that he over-exerted himself, though never so innocent of an intention of doing so—whereby he received injuries—are expressly excluded from the operation of the policy. Also the fact that the insured commits suicide, although insane, therefore in a legal sense accidental, excludes him from the benefit of the policy. The remaining clause stipulates for a further exemption of the appellee’s liability in the event that intentional injuries are inflicted upon the insured by himself or any other person. It is contended by the appellant that the meaning of this clause is, that, “if the insured intentionally inflicted injuries upon himself, or if any other person intentionally inflicted injuries upon him, with his consent, or at his instance, then the appellee shall not be liable.” A moment’s reflection will show that the clause will not admit of this construction. The clause, when placed in juxtaposition with its antecedents, reads as follows: “No claim shall be made under this ticket when the death or injury may have been caused by intentional injuries inflicted by the insured or

any other person." The sentence, though awkwardly expressed, is complete, and clearly expresses the idea that, if the insured intentionally kills or injures himself by the infliction of bodily wounds, he thereby breaks the condition of the policy; or that, if he is intentionally killed or injured by any other person, by the infliction of bodily wounds, the condition of the policy is thereby broken. Therefore to add the words, "with his consent or at his instance," would have the effect of torturing the meaning of the language used beyond its legitimate import. By the terms of the contract the company undertakes to indemnify against death or injury effected "through external, violent, and accidental means." By virtue of this undertaking the company would be liable, if the death or injury should be effected by any external and violent means whatever, that was as to the insured accidental, except in so far as the company by its proviso limited its liability; for it is a well-known rule of construction, that, where the undertaking of a party is expressed in general terms, as in this case, and specified things, as in this case, are excepted from the operation of the general terms, such terms are to be construed as covering all things coming within their scope, except those that are expressly excluded. As, therefore, the assassination of Hutchcraft was as to him an unforeseen event—a casualty—his taking off was through external, violent and accidental means. But we also think the clause of the proviso that excludes the appellee's liability, in case death or injury is intentionally inflicted by any other person, applies to this case. We think, however, that said clause was intended to apply to such injuries by other persons as are intentionally directed against the insured, and not to such injuries as the insured may receive at the hands of the third persons who are attempting to do mischief generally, or who are attempting to injure any particular individual other than the assured, or class of individuals, or any kind of property; for in such cases it cannot be said that the injury was intentionally aimed directly and individually at the insured.

The judgment of the Circuit Court, overruling the demurrer of the appellee's answer, is affirmed.

What are "accidents," within the meaning of accident policies and what the effect of provisos or exceptions in such contracts, can best be ascertained by a brief review of some of the principal cases upon this subject, and the chronological order will answer for this purpose as well as any.

Hartman v. Keystone Ins. Co. (1853), 21 Pa. 466. The condition of the policy was that it should be void if the insured "shall die by his own hand in, or in consequence of, a duel." Death was caused by swallowing arsenic. It was *held*, that such a death was within the condition. "When the parties have put their contract in writing, their rights are fixed by it. One rule of interpretation is, that we must never attribute an absurd intent, if a sensible one can be extracted from the writing. No absurdity could be greater than a stipulation against suicide in a duel. The words 'die by his own hand' must, therefore, be disconnected from those which follow; standing alone, they mean any sort of suicide."

Southard v. The Railway Passengers' Asso. Co. (1868), 34 Conn. 574, U. S. D. C. The policy insured against death or injury "by violent and accidental means, within the meaning of the contracts and conditions annexed." The conditions specified certain modes of death or injury which were excluded from the policy. It was *held*, that the specified exclusions did not operate to make the principal terms more largely inclusive, but that the death, though violent, must still fall strictly within the principal terms and be caused by means that were accidental as well as violent. The insured was hurt internally by jumping in great haste from a standing railroad car at a station, and running a considerable distance, but his

action was not necessary to his safety, but was voluntarily undertaken to effect an important object which required haste. The injury was not caused by "accidental means within the meaning of the contract." Per *SMITHMAN, J.* "The policy is one of indemnity against 'bodily injuries effected through violent and accidental means within the meaning of this contract and the annexed conditions.' Had the terms of the contract stopped at the words 'violent and accidental means,' there would be no difficulty in disposing of the question; for there was no accident, strictly speaking, in the means through which the bodily injury was effected. It would not help the matter to call the injury itself—that is, the rupture—an accident. That was the result, and not the means through which it was effected. Both were done by the claimant voluntarily, in the ordinary way, with no unforeseen, accidental, or involuntary movement of the body. There was no stumbling, or slipping, or falling. There was nothing accidental in his movements, any more than there was in his passing down the steps of his hotel or in walking on the street, during each of which he might have had a stroke of apoplexy. Thus, in jumping from the car and running, there was more violence, or, properly speaking, more force; but there was no more accident than in any ordinary movement of the body. All the accident there was, was the result of ordinary means, voluntarily employed, in a not unusual way. The conditions exclude death, when caused by duelling, fighting, etc. Now, it may be said that the exclusion of these specified causes, leaves, by fair implication, death from all other causes and under all other circumstances included in the contract. But, in applying the well-

known rule of construction, reference must be had to the main body of the contract and its subject-matter. It is not a contract of indemnity against death effected by all means. The cause of death or injury must be in all cases 'violent and accidental,' or the event is without the scope of the contract. The cases excluded are only those which belong to the same class. The insured jumped from the car with his eyes open, for his own convenience, and not from any perilous necessity. He encountered no obstacle in so doing. He alighted on the ground just as he intended to do. So, in running. In both cases, he accomplished just what he intended to do, in the way intended, and in the free exercise of his choice."

Brown v. Railway Passengers' Assn. Co. (1870), 45 Mo. 221. The policy was issued to an engineer, who was killed on his own locomotive. It provided against death "caused by accident while travelling by public or private conveyance provided for the transportation of passengers." It was held, that the deceased was insured against all accidents, without regard to the capacity in which he was acting. "It is strongly contended that a locomotive is not a conveyance for the transportation of passengers. This is true if the ticket applies solely and exclusively to passengers or travelers. But this ticket was designed to include something more than the ordinary risks incurred by a passenger. The locomotive is a necessary part of the conveyance. The ticket was a general accident, as contra-distinguished from a mere passenger's ticket. When the ticket was sold, it was known that the insured was an engineer."

Wells v. Conn. Mut. Life Ins. Co. (1871), 48 N. Y. 34. By a condition, the policy was forfeited in case the

insured entered into any military or naval service without the consent of the company. It was also provided that he was not insured against death from any of the casualties or consequences of war or rebellion; or from belligerent forces in any place where he (the insured) might be. The insured was employed in the army in building bridges, and, while so engaged, was killed by two of a party of men, not in uniform, who robbed the men employed upon the bridge. Held, that the service which was forbidden, was only such as would require the person to do duty as a combatant. That the "war or rebellion" was such as was carried on by the authority of some *de facto* government.

North Am. Life and Acc. Ins. Co. v. Burroughs (1871), 69 Pa. 43. An accident policy insured against death resulting, within twelve months from its date, in consequence of an accident. The insured was killed by an injury produced by a stroke from the handle of a pitchfork, which slipped while he was using it in loading hay. It was held, that the policy included a death from any unexpected event, happening by chance, and not occurring according to the usual course of things.

Shader v. Railway Passengers' Assn. Co. (1876), 66 N. Y. 441. An accident insurance policy contained a proviso that no claim should be made thereunder, "where the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drink." The insured was killed by a pistol shot while dining with a friend. The evidence tended to show that he was at the time under the influence of intoxicating liquor, of which he had been drinking freely. The trial Judge charged as follows: "The question is

not simply whether he was under the influence of intoxicating liquor at the time, but whether the injury occurred in consequence of that; whether the injury was the natural and probable result of his being in that condition. The jury must see the connecting link between the injury and the condition he was in." This was *held* an error. "The first inquiry," say the Court, "which presents itself, is the construction to be placed upon the proviso. An exact and accurate interpretation of the language manifestly conveys the idea, that it was intended to comprehend all cases where injury or death might happen while the insured was under the influence of intoxicating drink, as well as such as might occur by the use thereof. As to the first class of cases stated in the proviso, the words imply that it is not required that the use of intoxicating liquors should be the moving cause in producing the injury or death, and it is quite sufficient to avoid a liability, that the person was under the influence of such stimulants, without regard to the effect which might result from such condition. The limitation in the policy relates to the condition of the insured, not to the cause which might produce death. And here lies the distinction which is to be drawn in its construction, for, by any other or different interpretation, the words used would not only be unnecessary, but meaningless and without point. As the policy was rendered void if the assured was injured or killed while under the influence of intoxicating drinks, it was not essential, to work a forfeiture, that injury or death should occur in consequence of the use of the same. As to the second class of cases, the policy was designed to provide for the possible contingency which might arise after the influence of intoxi-

cating liquors had ceased to operate directly, and the subsequent effects produced thereby, in consequence of the previous use thereof. The intention evidently was to limit the liability of the company by the contract with the assured, and not to incur any responsibility, when the injury occurred while the assured was directly under the influence of, or where the result was remotely produced by, intoxicating drink. Accidental policies are issued principally to travellers, or persons exposed to unusual perils and dangers, and, the risks in such cases being extremely hazardous, it is by no means unreasonable that the insurer should require that the assured should be under no exciting influence, which may affect his self-possession or judgment, or seriously interfere with the free, full, and deliberate exercise of his faculties in protecting himself from accident or harm."

Bayliss v. Travelers' Ins. Co. (1877), U. S. C. Ct. E. Dist. of N. Y. A policy against accidental death provided that it did not cover "any death which may have been caused solely or in part by medical treatment for disease." The insured died in consequence of having inadvertently taken an overdose of opium, which had been prescribed by a physician on account of sickness. It was *held*, that this death was within the exception.

McCarthy v. Travelers' Ins. Co. (1879), U. S. C. Ct., E. Dist. of Wis. A policy provided that there should be no liability, if the insured should sustain bodily injuries effected through accidental means. The injury was claimed to have resulted from exercising with Indian clubs. The jury was instructed: "If the insured voluntarily used clubs for exercise in the way, and precisely as, he intended to do, and in the usual way for taking such exercise, and there did not occur

any unusual circumstance interrupting or interfering with such use, or causing any unforeseen, accidental, or involuntary movement of the body while exercising, and in such use the injury was received, it could not be said that the injury was effected by accidental means. But if there did occur any unforeseen or unexpected circumstance which interfered with or obstructed the usual course of such exercise, and there was thereby produced an involuntary movement, strain, or wrenching of the body, by means of which the alleged injury was occasioned, then such means was accidental within the meaning of the policy."

Bon v. Railway Passengers' Assn. Co. (1881), 56 Iowa 664. A policy provided: "The insurance shall extend only to bodily injuries, when accidentally received by the insured while actually riding on a public conveyance provided by common carriers for the transportation of passengers, and in compliance with all rules and regulations of such carriers, and not neglecting to use due diligence for self-protection." The insured was riding on a railroad train, and as it approached a station and was slowing up, he went on to the platform, and, while standing there, was thrown from the train by being jostled by another passenger on the platform, who was thrown against the insured by a sudden jerk of the train. The rule of the carrier, which was known to the insured, was that no one should stand on the platform. It was *held*, that, under such a state of facts, the verdict for the company should be directed.

Penfold v. Universal L. Ins. Co. (1881), 85 N. Y. 317. The policy contained a condition avoiding it in case the insured should "die by his own hand or act, voluntary or otherwise."

It was *held*, that this did not cover the case of a death, purely accidental, caused by poison taken by the insured by mistake or ignorance, he being at the time sane. That the act stipulated against was suicide, and the words "voluntary or otherwise" precluded one claiming under the policy, if the death was suicidal, from setting up insanity.

Pollock v. U. S. Mut. Acc. Assn. (1883), 102 Pa. 230. An accident policy provided that it should not extend to death or injury caused "by the taking of poison." *Held*, that an involuntary taking of poison by mistake was within the provision.

Burkhard v. Travelers' Ins. Co. (1883), Id. 262. A policy against accidental death provided, "this insurance shall not extend to any case when the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure; walking or being on the road-bed or bridge of any railway are hazards not contemplated or covered by this contract, and no sum will be paid for disability or loss of life in consequence of such exposure or while thus exposed." The insured stepped off a railroad train, upon which he was travelling, when it came to a stop on a draw-bridge at night, fell through a concealed hole in the bridge and was killed. It was *held*, that, where the general terms and scope of a policy are such as to cover a loss, conditions in the policy restricting liability, so expressed as to be capable of two meanings, should be held to have the meaning most favorable to the insured. Also, that this death was accidental, and was not within the condition as to "walking, etc.," as the obvious intent of this provision was to guard, not against a defective road-bed or bridge, but against the danger of in-

jury from trains passing thereon. The Court say: "The true principle of sound ethics is to give the contract the sense in which the person making the promise believes the other party to have accepted it. A just sense should be exercised in so interpreting it as to give due and fair effect to its provisions: 2 Kent, 557. When a party uses an expression of his liability, having two meanings, one broader and the other narrower, and each equally probable, he cannot, after an acceptance by the other contracting party, set up the narrow construction: 2 Whart. on Con. § 670. It is now well recognized as a general rule, that when a stipulation or exception on a policy of insurance is capable of two meanings, the one is to be adopted which is most favorable to the insured: May on Ins. §§ 172-9; Wood on Ins. §§ 141-6; *Allen v. Ins. Co.* (1881), 85 N. Y. 473; *Western Ins. Co. v. Cropper* (1858), 32 Pa. 351. In case of doubt as to the meaning of a term emanating from an insurance company, it is to be construed most strongly against the company: *Fowler v. Ins. Co.* (1863), 3 B. & S. 917; *Wilson v. Ins. Co.* (1856), 4 R. I. 156; *Bartlett v. Ins. Co.* (1859), 46 Me. 500; *Ins. Co. v. Slaughter* (1870), 12 Wall. 404. To make him (the insured) guilty of a 'voluntary exposure to danger' he must intentionally have done some act which reasonable and ordinary prudence would pronounce dangerous. * * * It is true he voluntarily left the car; but a clear distinction exists between a voluntary act, and a voluntary exposure to danger. Hidden danger may exist; yet the exposure thereto without any knowledge of the danger does not constitute a voluntary exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The

result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary; yet the exposure involuntary. The danger being unknown, the injury is accidental. The language of the exception (as to 'walking or being, etc.') clearly implies two thoughts: one, that the insured must not be on the road-bed or bridge for any length of time; the other, that the prohibition is not to guard against injury resulting from a defective road-bed or bridge; but against the danger of injury from trains passing thereon. If the design was to apply the language to bridges defectively constructed or out of repair, it would not have been restricted to railway bridges."

Bloom v. Franklin L. Ins. Co. (1884), 97 Ind. 478. The policy provided that it should be forfeited in case the assured should die by reason of intemperance or while engaged in the known violation of law. The assured, whilst intoxicated, engaged in an assault and battery upon his sister-in-law, and his brother, while defending his wife, fractured his skull and killed him. The Court say: "The answer of the company averred, 'said B. (the assured), while in a state of intoxication, assaulted, etc., C., and while thus engaged in perpetrating said assault, D., the husband, for the purpose of lawfully defending his wife, struck B. upon the head with a jack-plane, or some other wooden instrument, thereby fracturing his skull and causing his death within a few hours thereafter.' The plaintiff asserts that the facts stated do not show that the assured died from the effects of intemperance, or that he met his death while engaged in knowingly violating the law. It is sufficient to state such facts as would enable the Court to conclude, as matter of law, that there was an assault and battery

committed. The facts stated warrant this conclusion. If the words employed are taken in their usual signification, it would seem quite clear that death in the known violation of any law, criminal or civil, would make the policy inoperative. Suppose that the law prohibits a person from approaching within a specified distance of a blast about to be fired, would not a known violation of such a law increase the risk, and be within the letter and spirit of the provision? But it is not every violation of law which should absolve the company, even though the law be a criminal one. Suppose a man violates the law against profanity, and is shot while so doing, should that absolve the company from liability?

"In our opinion the law is this: *A known violation of a positive law, either civil or criminal, avoids the policy, if the natural and reasonable consequences of the violation are to increase the risk; but does not avoid the policy, if the risk is not increased.* Whether the violation of the law was the proximate cause of death and was an act increasing the risk, must in general be determined from the facts of each particular case. There must, in all cases, be some causative connection between the act which constituted the violation of the law, and the death of the assured. The act of the insured was, in this case, the proximate cause of his death, within the meaning of the law. A man who makes a violent assault upon a woman, puts his own person in danger. The natural result of such an illegal act as that of the assured, was to bring his person in danger, and as death resulted, his own act was the proximate cause. While the unlawful act of the assured must lead, in the natural line of causation, to his death, in order to work a forfeiture, it is not necessary that

the act should be the direct cause, nor that the precise consequences which actually followed should have been foreseen. It is enough if the act is unlawful in itself, and the consequences flowing from it are such as might have been reasonably expected to happen, for the ultimate result is traced back to the original proximate cause. A man who beats and maltreats another's wife may reasonably expect the husband to defend her, without being careful to select the means of defence or nicely weigh the degree of force."

Bois v. Mass. Mut. Life Ins. Co. (1885), 14 Ins. L. J. 237 (La). Where the person whose life is insured has occasioned the discharge of the pistol which killed him, the burden of proof is on the beneficiary to show that the discharge was accidental.

Bradley v. Mut. Ben. Life Ins. Co. (1871), 45 N. Y. 422. The policy provided that it should be void in case the insured should die "in the known violation of any law of the State he was permitted to visit. It was held, that the death must clearly appear to have been the natural and legitimate consequence of the violation of the law.

N. W. Mut. Life Ins. Co. v. Hazlett (1885), 105 Ind. 212. A provision in a life insurance policy, that if the assured, whether sane or insane, shall die by his own hand, the policy shall be void, has no application to a case where death results from an overdraft of whiskey taken without any intention of destroying life, by one who had become physically and mentally weak by causes beyond his control.

Accident Ins. Co. v. Crandal (1886), 120 U. S. 527. A policy of insurance against "bodily injuries effected through external, accidental, and vio-

lent means," and occasioning death or complete disability to do business, provided, that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries." It was *held*, that a death by hanging one's self, while insane, was covered by the policy; that such death was not caused by "bodily infirmities, or disease, or suicide, or self-inflicted injuries," but was effected through "external, accidental, and violent means."

Sup. Council of O. of C. F. v. Garrigus (1885), 104 Ind. 133. The relief laws provided that benefits might be received by a member who was disabled by "disease or accident." The beneficiary was injured without his own fault, but by an intentional act on the part of another. It was *held*, that an injury intentionally inflicted by another, but without fault on the part of the injured, was an accident, within the meaning of the insurance contract.

Griffin v. West. Mut. Asso. (1886), 20 Neb. 620. The policy contained a provision that it should be void, if the insured should die "while violating any law." The insured with an accomplice went to the State treasury, and, presenting a pistol, demanded money. The treasurer handed over the money to them, and they started away with it and had nearly reached the outer door of the building, when they were fired upon by a policeman, and the insured was killed. It was *held*, that the policy was not avoided. "The act of the insured in obtaining the money was complete and he was endeavoring to make his escape. He, therefore, was not killed while violating the law."

Keels v. Mut. Res. Fund L. Asso. (1886), 29 Fed. Rep. 198; U. S. C. Ct.

D. So. Car. A condition in a life insurance policy that it shall be void if the insured shall die by suicide, whether the act be voluntary or involuntary, does not apply, where the death is the result of accident or unintentional self-killing.

Freeman v. Travelers' Ins. Co. (1887), 144 Mass. 573. The policy insured against bodily injuries "effected through external, violent, and accidental means," and contained a proviso that the insurance should not "extend to any bodily injuries where death or injury may have happened in consequence of violent exposure to unnecessary danger, hazard, or perilous adventure," and a further condition that "the party insured is required to use all due diligence for personal safety and protection." The insured, who was the employé of a railroad company, was killed by a train, while upon the track, where he had been sent to shovel snow from the crossing. It was *held*, that such death was by "external, violent, and accidental means;" that such position was not "unnecessary exposure to danger;" and that the burden was upon the insurance company of showing that the insured had not used "due diligence for personal safety," etc.

Utter v. Travelers' Ins. Co. (1887), Sup. Ct. Mich. This policy was against death by "violent, external, and accidental means," and contained the following provisions: "No claim shall be made when the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, or while the insured was, or in consequence of his having been, under the influence of intoxicating drink, or while engaged in, or in consequence of, any unlawful act." Also, "This insurance shall not be held to extend to disappear-

ances, nor to any case of death or injury, unless the claimant under policy shall establish by direct and positive proof that said death or injury was caused by external, violent, and accidental means, and was not the result of design, either on the part of the deceased or of any other person." The insured was a deserter from the army, and an officer of the law instructed to arrest him shot and killed him, upon the insured's appearing at the door of the house where he was stopping. The evidence was conflicting as to whether the officer knew that the man he shot was the person for whom he was searching, and as to whether the shooting was done in self-defence, because the officer was threatened with a pistol. It was held, that if the officer did not know that the insured was the party he fired at, and did not intend to kill him, it could not be claimed, as a matter of law, that the death was the result of design within the policy; and that the question whether the insured was doing an unlawful act at the time of the killing was for the jury. The trial Court was of the opinion "that the injury was a pistol-shot wound, and the firing of the pistol was not accidental, but designed by the firing party, and that the policy was not intended to insure against murder or wilful killing of any kind, but intended to insure against ordinary accidental means alone," and directed a verdict for the insurance company. The Supreme Court reversed, holding that the questions involved were for the jury, and in their opinion say: "The design intended by the terms of this policy must be the design that intended the actual result accomplished, and not the design of the act itself, which act resulted in the killing of one contrary to the design of the act. If, when Berry fired the

shot, he did not know the man he fired at was Utter, and did not intend to kill Utter, it cannot be said that Utter lost his life by the design of Berry. Nor can it be held, as a matter of law, that Utter was engaged in an unlawful act, within the meaning of this policy. If, on being refused admission after rapping on the door, the officer had fired through the door and killed Utter, it could not be claimed that Utter was killed by design, or because he was engaged in any unlawful act; nor if Berry fired at the first head he saw poked out of the door, not knowing or caring who it was, can it be held that the death was by design against Utter, or in consequence of any unlawful act on his part."

The following positions would seem to be established by the foregoing authorities:—

"Accident" has the same meaning in a policy of insurance that it has in the ordinary affairs of every-day life. It is an unforeseen, fortuitous event; not happening through design or intention.

Where a policy provides that the death must be effected through "violent and accidental means," violence and accident must concur in producing the result.

A proviso that no claim shall be made in certain specified cases does not operate to make the principal terms more largely inclusive, but restricts them.

A specified case, excepted from the general terms of a policy by a proviso, in order to forfeit the policy, must be one which increases the risk, and not merely one which falls within the letter, or language, of the contract.

The expression "may have happened," in a proviso, does not include doubtful cases, where it is merely uncertain whether or not the death

occurred by reason of the causes specified. It must still be proved that the death was effected by some of the excepted causes.

A proviso may declare that the policy shall not cover the case of a death which happened either by a specified cause or while the insured was in a specified condition.

Where it is provided that the policy shall not cover a death which happens in consequence of, or while the insured was engaged in, a certain act, it is not sufficient to prove merely the act and the death; there must appear a connecting link between the act and the death.

Where the terms of a proviso are of doubtful, or capable of more than one, meaning, they are construed most strongly against the insurance company.

The intention of the injurer to do a hurt does not make the injury the less accidental, so far as the insured is concerned.

Where a policy provides that it does not cover a case of death happening through design, a particular design to injure or kill the insured is meant.

In *Hutchcraft's Ex. v. Travelers' Ins. Co.*, *supra*, the Court agree that the death was accidental, so far as the insured was concerned; and this view seems to be supported by the authorities. Was the death within the proviso? Three classes of cases are excepted from the general terms of the policy, in the following provision: "And no claim shall be made under this ticket when the death or injury may have been caused (1) by duelling, fighting, wrestling, lifting, or over-exertion; (2) by suicide, felonious or otherwise, sane or insane; (3) by intentional injuries inflicted by the insured or any other person." For the purposes of this case, the proviso

is as if it read, " * * * when the death may have been caused by intentional injuries inflicted by the insured or any other person." The Court say this clause means, "that if the insured intentionally kills or injures himself by the infliction of bodily wounds, he thereby breaks the condition of the policy; or that, if he is intentionally killed or injured by any other person, by the infliction of bodily wounds, the condition of the policy is thereby broken." The Court refer the adjective "intentional" to the "death," and not to the "injuries." This construction of this clause does not appear to be correct. If the "death" was "intentional," it would seem not to be "accidental," and therefore, it would be without, and not within, the policy, which is against accident. And in that case, of course, there could be no claim under the policy, not because of the proviso which excepted from the general terms certain kinds of accidental death, but because the death happened from a risk not insured against.

The adjective "intentional" in this clause qualified the injuries, whether inflicted by the insured or other person, and therefore characterizes the same kind of act on the part of the insured or any one else. In the case of the insured, this cannot be held to mean "intentional death," for this has already been provided for by the clause against suicide, which covers all cases of intentional death on his part. This construction also makes the whole proviso absurd, for it then would read "when the death may have been caused by intentional death." To hold, however, that the adjective qualifies the word "injuries" gives the clause a perfectly intelligible meaning, and shows that the policy is intended to provide for an accepted class of causes of acci-

dental death, in addition to the classes in the first and second clauses of the proviso. For while the "injuries" inflicted may have been "intentional," the death may still be "accidental," and if, in a given case, the death was actually caused by these "intentional injuries," then, although "accidental," it is not covered by the policy.

The question, therefore, in each case would be, was the death caused by the injuries inflicted?

This case seems to have come before the Court on a demurrer to the answer filed by the insurance company, and the Court of Appeals affirm the judgment of the lower Court in overruling this demurrer. The Court in their opinion say: "He (the insured) was waylaid and assassinated for the purpose of robbery." This statement would generally be considered to be a conclusion from a series of facts stated in the pleadings or proved in evidence. If the answer simply sets forth the conclusion which is stated in the opinion, it would seem that a mistake in pleading had been made, and there had been raised a question of law for the Court, when there should have been a question of fact for the jury; with, perhaps, happier results for the beneficiaries under this policy.

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In the following recent cases, conditions in accident and life insurance policies, similar to those considered above, have been construed by the Courts:

Bacon v. U. S. Mut. Accident Assn. (1887), 44 Hun (N. Y.), 599. Death resulted from a malignant pustule, which was caused by poison communicated from the skins of diseased animals; the policy insured against

death "by external, violent, and accidental means," and excepted death by taking poison. *Held*, that the insured was liable.

Fuel v. Travelers' Ins. Co. (1887), 45 Id. 313. Death was caused by the accidental inhaling of escaping illuminating gas by the insured, while asleep in his bed-room at a hotel; the policy covered death "through external, violent, and accidental means," but excepted bodily injuries, "of which there shall be no external and visible sign upon the body," and "death by the taking of poison, contact with poisonous substances, or inhaling of gas, or by any surgical operation, or medical treatment." *Held*, that the death was within the policy, and the insurer was liable. The words "inhaling of gas," in the exception, referred only to the use of gas in dentistry, surgery, or other similar manner.

U. S. Mut. Accident Assn. v. Newman, S. Ct. App. Va., Dec. 13, 1887. Death was caused in the same manner as in the last cited case; the policy covered the same risks, but excepted death caused "by taking of poison, or by contact with poisonous substances." *Held*, the death of the insured was within the policy.

Travelers' Ins. Co. v. McConkey (1888), 127 U. S. 661. The insured was found dead from a pistol-shot through the heart. There was no evidence to show whether his death occurred by his own act, or by that of another person; the policy insured against death "through external, violent, and accidental means," but excepted death by "suicide, felonious or otherwise, sane or insane," or "intentional injuries inflicted by the insured or any other person." *Held*, that the burden of proof was upon the claimant to show that death was caused by external violence and accidental means.

McGlinchey v. Fidelity & Casualty Co. (1888), 8. Jud. Ct. Mo., 27 AMERICAN LAW REGISTER, 607, 663. Death caused by the exertion of controlling a runaway horse, or by fright occasioned to the driver by the peril of his situation, is covered by an accident insurance policy. A clause excepting bodily injuries, of which there is no external and visible sign upon the body, does not extend to injuries, which result in death.

Travelers' Ins. Co. v. Jones (1888), 8. Ct. Ga., Aug. 28, 1888. The insured fell and was injured while attempting, on a dark and rainy night, and with two packages in his hands, to cross a railroad trestle, which he knew to be dangerous, although other ways to his home were open to him. *Held*, that the injury was caused by "voluntary exposure to unnecessary danger" thus falling within the exception in the policy.

National Benefit Asso. v. Grauman (1886), 107 Ind. 288. A policy limiting the risk to death "proximately caused by physical injuries, of which there shall be some visible external sign," covers death from apoplexy, resulting from an injury caused by an accidental fall.

Tennant v. Travelers' Ins. Co. (1887), U. S. Circ. Ct. N. D. Cal., 31 Fed. Rep. 322. The insured, who was subject to epileptic fits, was found dead in a bath. The testimony showed that the entrance into the bath of one in his physical condition would be likely to result in an epileptic attack. *Held*, that the death was not occasioned "by external, violent, and accidental means."

In the English case of *Winspear v. Accident Ins. Co., Lim.* (1880), L. R. 6 Q. B. D. 42, an accident insurance policy, which provided that it should

not extend "to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease," was *held* to cover a case where the insured, whilst fording a stream, was seized with an epileptic fit, fell and was drowned.

In *Lawrence v. Accidental Ins. Co., Lim.* (1881), 7 Id. 216, where the policy expressly excepted "death arising from fits, or other disease, whether causing such death directly or jointly with an accidental injury," the insured, while on the platform of a railway station, was seized with an epileptic fit, fell upon the track before a moving engine, and was run over and killed. *Held*, that the death was within the policy.

Kerr v. Minnesota Mut. Ben. Asso. (1888), 8. Ct. Minn., 27 AMERICAN LAW REGISTER, 803. Suicide to avoid arrest and trial for a crime committed by the insured, does not fall within a provision of a policy, excepting death "in consequence of the violation of any criminal law."

Darrow v. Family Fund Soc. (1886), 42 Hun (N. Y.), 245, and *Freeman v. Nat. Benefit Soc.*, Id. 252. Suicide by insured does not avoid a policy, providing that it shall be void, if the insured shall die "in violation of, or attempt to violate, any criminal law."

Scarth v. Security Mut. Life Soc. (1888), 8. Ct. Iowa, 27 AMERICAN LAW REGISTER, 803. Suicide, committed while the insured is temporarily insane and in no manner conscious or responsible, avoids a policy providing that it shall become void, if the insured "shall commit suicide, felonious or otherwise, sane or insane."

To the same effect is *Streeter v. West. Un. Mut. Life Soc.*, 8. Ct. Mich., Feb. 15, 1887.

JAMES C. SELLERS.

ABSTRACTS OF RECENT DECISIONS.

AGENCY.

Interest is not coupled with the agent's authority, so as to prevent revocation of the power, where the agency is to loan money for the principal and collect the interest on the loans, for an annual commission on the existing amount of the loans, to be deducted from the interest as collected: *Oregon & W. M. S. Bank v. American Mtge. Co.*, U. S. Circ. Ct. Dist. Oregon, May 7, 1888.

BANKRUPTCY.

Sale of real estate by assignee in bankruptcy, under the United States Bankruptcy Act, must be made in pursuance of an order of the Bankrupt Court, in order to discharge incumbrances; without such order the assignee sells subject to incumbrances, and a purchaser gets no better title than the bankrupt had: *Lee v. Rogers*, S. Ct. App. W. Va., Sept. 15, 1888.

BANKS AND BANKING.

Check deposited for collection imposes upon a bank the obligation to return either the check or the money; so, if the collecting bank surrenders the check to the bank upon which it is drawn, and accepts a cashier's check in lieu thereof, its liability to its depositor is fixed as much as if it had received the cash: *Fifth National Bank of Pittsburgh v. Ashworth*, S. Ct. Pa., Jan. 7, 1889.

Deposit in bank may be applied to the payment of the depositor's paper held by the bank for collection, even when the former, after the deposit of the money, has made a voluntary assignment for the benefit of creditors: *Farmers' Deposit Nat. Bank v. Penn Bank, for use, etc.*, S. Ct. Pa., Jan. 7, 1889.

National Bank, deducting usurious interest from the face of a note discounted, can recover only the face of the note, less the interest deducted; if the borrower pays the usurious interest in advance, he is entitled to recover double the interest so paid: *Schuyler National Bank v. Bollong*, S. Ct. Neb., Nov. 21, 1888.

BILLS AND NOTES.

Consideration is imported by a promissory note, and the burden of proof is upon the party alleging the contrary: *Flint v. Phipps*, S. Ct. Or., July 2, 1888.

Failure of consideration may be alleged as a defence to a promissory note given as a retainer to attorneys in a prosecution against the maker for homicide, when, after the note was given and before trial, the maker was killed by a mob: *Agnew v. Waldon*, S. Ct. Ala., July 12, 1888.

Joint makers of a promissory note may show by parol evidence that one of them is the principal debtor, and the others are his sureties: *First Nat. Bank of Covington v. Gaines*, Ct. App. Ky., Oct. 13, 1888.

Notice of protest is insufficient, where the notary who protests a note, which has been discounted by a bank, makes inquiry only of the receiving teller of the bank as to the indorser's residence, and, not receiving the desired information, mails the notice without further inquiry to the indorser at the place where the note bears date. *Sweet v. Powers*, S. Ct. Mich., Nov. 1, 1888.

Parol evidence that a note was indorsed at the request of the payee, who promised that the indorser should not be held upon the note, and that he would look to the maker alone for payment, is admissible to show want of consideration: *Kulenkamp v. Groff*, S. Ct. Mich., Oct. 19, 1888.

Parol evidence is inadmissible to show that, when certain promissory notes were made, there was an oral agreement between the parties that, if the maker should be forced to make an assignment for the benefit of creditors, the payee should file his claim with the assignee, and execute a full release of all claims upon the notes beyond the amount which might be paid under the assignment: *Harrison v. Morrison*, S. Ct. Minn., Nov. 2, 1888.

Presentment for payment to maker of a note will be excused, where the note was made in Minneapolis, Minnesota, no place of payment being fixed, the payee then residing in that city and the maker in Wisconsin; the payee indorsed the note to a third party, who knew that the maker resided in Wisconsin; but subsequently the maker, without the knowledge of the holder, removed to Minneapolis, where he resided at the time the note fell due: *Salisbury v. Bartleson*, S. Ct. Minn., Nov. 12, 1888.

Second indorser, who writes his name before, instead of after, that of a prior indorser, cannot recover from the latter the amount paid in taking up the note after dishonor: *Sweet v. Powers*, S. Ct. Mich., 471.

CITIZENSHIP.

Birth in the United States from Chinese parents, not engaged in any diplomatic or official capacity under the emperor of China, makes the child a citizen of the United States, and this *status* cannot be changed by the father during the child's minority; the child must have arrived at maturity, and the United States consented, before citizenship can be lost: *Ex parte Chin King*, U. S. Circ. Ct. Dist. Oregon, June 25, 1888.

CONSTITUTIONAL LAW.

All crimes for which trial by jury is provided in Art. III. Const. U. S. are not merely felonies or offences punishable by confinement in the penitentiary, but as well some classes of misdemeanors, the

punishment of which involves, or may involve, the deprivation of liberty of the citizen: *Callan v. Wilson*, S. Ct. U. S., May 14, 1888.

Sixth Amendment to Const. U. S. does not supplant that part of Art. III. Const. U. S., relating to trial by jury, so as to permit Congress to declare in what way other than by jury persons should be tried, when accused of crime on the high seas, and in the District of Columbia, and in places ceded for the seat of government, forts, magazines, arsenals, and dockyards: *Id.*

CORPORATIONS.

President of corporation made a promissory note to his own order, indorsed it, had it discounted, and used the proceeds for the corporation's benefit; in a suit upon the note by the administratrix of the president, who had taken it up at maturity, the corporation having retained the benefit of the transaction, was estopped from denying the authority of the president to execute the note: *Tuscaloosa Cotton-Seed Oil Co. v. Perry*, S. Ct. Ala., June 27, 1888.

Subscription to stock of one corporation by another, unless expressly authorized by statute, is *ultra vires* and void: *Valley R. W. Co. v. Lake Erie Iron Co.*, S. Ct. Ohio, Oct. 16, 1888.

CRIMINAL LAW.

Reversal of conviction for crime and the awarding of a new trial, upon appeal by defendant, will not bar further prosecution on the same charge, though defendant in his appeal did not ask for a new trial, but only for a reversal and his discharge from imprisonment: *People v. Travers*, S. Ct. Cal., Sept. 28, 1888.

DAMAGES.

Falses and fraudulent representation by the agent of a railroad company that the physician of a person, who had been injured through the company's negligence, had stated that her injuries would soon be cured with proper treatment, by reason of which representation she was induced to sign a release of her claim for damages, is sufficient ground for the rescission of the release, notwithstanding the fact that she may have entertained doubts as to the correctness of the alleged opinion of the physician: *Peterson v. Chicago, M. & St. P. Ry. Co.*, S. Ct. Minn., June 12, 1888.

Recovery cannot be had against a railroad company for cutting across a ditch embankment in the construction of its line and thereby draining more surface water into the ditch than it could hold and flooding the adjoining land, the owner of the land having already received damages for the taking of the land where the road was constructed, including "the legal incidental damages to the land not taken": *Bell's Ex'rs v. Norfolk S. R. Co.*, S. Ct. N. C., Oct. 8, 1888.

ELECTIONS.

Rejection of returns from certain townships by a board of canvassers, whose action is conclusive upon no one, is immaterial to the determination of an issue to test the rights to the office in question: *Gatling v. Boone*, S. Ct. N. C., Oct. 8, 1888.

EVIDENCE.

Certified copy of deed for lands in Georgia, though authenticated as required by Act of Congress, is not admissible in evidence in Alabama, without proof of the loss or destruction of the original, as under the statutes of Georgia it would not be admissible in that State without such proof: *Whann v. Atkinson*, S. Ct. Ala., July 16, 1888.

Hypothetical questions to medical experts may assume any state of facts which there is evidence tending to prove; in such a question, embodying a patient's assumed symptoms and condition, the expert may be asked what, in his judgment, is the probability of recovery: *Peterson v. Chicago M. & St. P. Ry. Co.*, S. Ct. Minn., June 12, 1888.

On cross-examination of a witness he was asked, in language hardly proper, whether his testimony was not false, and resented the question; he was then asked whether certain statements made by him were not without foundation in fact; the Court, in the exercise of its authority to prevent unseemly scenes between counsel and witness, properly sustained an objection to the latter question and stopped the course of the examination: *Baldwin v. St. Louis K. & N. W. Ry. Co.*, S. Ct. Iowa, Oct. 2, 1888.

FIRE INSURANCE.

Additional insurance was procured by the insured on the representation of an agent that it would be all right—the original policy providing that, if the insurer should procure such additional insurance without the consent of the company, the policy should be void, and that the agent had no authority to modify any of its conditions. The company was not estopped from denying liability, although the insured had never seen the policy, and although the agent had authority in a certain way to consent to additional insurance, and had done so in other cases, but had not consented in this instance in the manner prescribed by the policy: *Cleaver v. Traders' Ins. Co.*, S. Ct. Mich., Oct. 5, 1888.

Waiver of condition of policy, where there is evidence from which it may be found, is a question for the jury. *Id.*

HUSBAND AND WIFE.

Claim for services by a woman who married a man, supposing him to be unmarried, and lived with him as his wife until his death, but who learned afterwards that he had a former wife living, and not

divorced, at the time of the marriage, cannot be sustained against his administrator : *Cooper v. Cooper*, S. Jud. Ct. Mass., Sept. 5, 1888.

INTERSTATE COMMERCE LAW.

Car properly adapted to carry the quantity designated should be furnished by the carrier, when a carload lot in weight or quantity is defined and a rate designated: the shipper cannot lawfully be required to go to any expense in fitting up the car : *Rice et al. v. W. N. Y. & Pa. R. R. Co.* The Commission, December 3, 1888.

Interchange of traffic, through the customary reasonable and equal facilities, cannot be denied by one railroad to another on the ground that the latter supplies no public necessity: all railroads authorized by competent public authority must be conclusively presumed to be conveniences : *Ky. & Ind. B. Co. v. L. & N. R. R. Co.* The Commission, August 2, 1888.

Reasonableness and justice of rates must be determined not alone by the exigencies of the complainant's business, but with due regard for the circumstances of the carrier as well. The rate challenged may be high for the distance hauled, if that only be regarded, but it is not a violation of the law for the carrier to accept a less division of a through rate for traffic going over its road than the charges to the stations it serves; the circumstances and conditions are substantially different and the service entirely dissimilar : *Rice et al. v. W. N. Y. & Pa. R. R. Co.* The Commission, December 3, 1888.

JUDGMENTS.

Assignment of judgment in action of tort cannot be made before the judgment has been actually entered, even though a verdict has been rendered upon which judgment may be, and is afterwards signed : *Gamble v. Central R. & Banking Co.*, S. Ct. Ga., July 11, 1888.

JURISDICTION.

Forgery by officers of a national bank who, with intent to deceive the United States bank examiner, forge a promissory note and enter it upon the books of the bank as assets, may be tried in the State Courts, notwithstanding the fact that the Federal Courts have exclusive jurisdiction to determine the falsity of the entries : *State v. White*, S. Ct. N. C., Nov. 5, 1888.

State Courts may entertain jurisdiction of suits brought against national banks under sections 5197 and 5198 of the Revised Statutes of the United States, to recover the penalty for charging usurious interest : *Schuyler National Bank v. Bollong*, S. Ct. Neb., Nov. 21, 1888.

LIBEL.

Pleadings addressed to and filed in a Court of competent jurisdiction, which are pertinent and material to the relief sought, whether

legally sufficient to obtain it or not, are absolutely privileged, and, however false and malicious, are not libellous: *Wilson v. Sullivan*, S. Ct. Ga., May 23, 1888.

LIFE INSURANCE.

By-law of mutual benefit society, which conflicts with the terms of the policy, the society having power under its charter to issue such a policy, will be construed to have been waived in favor of the assured, and the provisions of the policy will determine the right of the parties, notwithstanding the by-law: *Davidson v. Old People's Mut. Ben. Soc.*, S. Ct. Minn., Oct. 16, 1888.

Drunkenness cannot be set up as a defence by a mutual benefit association which issued a certificate, containing a provision avoiding it, if the assured should use alcoholic stimulants to the injury of his health, to a person known to its agent to be a confirmed drunkard: *Newman v. Covenant Mut. Ben. Assn.*, S. Ct. Iowa, Oct. 26, 1888.

LIMITATION.

Acknowledgment sufficient to remove the bar of the statute from a particular note, is not shown by a letter which, after alluding to "those old notes," concluded, "I have no money now, but you shall have every cent that is due on them:" *Stout v. Marshall*, S. Ct. Iowa, Oct. 18, 1888.

Indorsement on note made and signed by debtor, after it has become barred by limitation, in these words, "I hereby acknowledge the indebtedness of this note," takes the note out of the operation of the statute: *Drake v. Sigafos*, S. Ct. Minn., Nov. 12, 1888.

Government suits to revoke land patents for fraud and misrepresentation may be met by pleas of the Statute of Limitations and laches, when the United States is only a nominal plaintiff, did not own the lands, has no real interest in the controversy, and is prosecuting the actions for the sole benefit of private persons: *U. S. v. Beebe*, S. Ct., U. S., April 30, 1888.

Running of statute in favor of bailee does not begin until he denies the bailment and converts the property: *Reizenstein v. Marquardt*, S. Ct. Iowa, Oct. 2, 1888.

MASTER AND SERVANT.

Door boy, employed in coal-mine, whose duty was at a given signal to open and shut the door through which cars passed into and out of the mine, was killed by several loose cars starting of their own accord, without warning or signal, by reason of their brakes being defective; at the time but one brakeman, or "spragger," instead of two, as was customary, was in charge of the cars: no contributory negligence being shown, the employer was liable: *Southwest Va. Imp. Co. v. Smith's Admr.*, S. Ct. App. Va., Aug. 23, 1888.

NEGLIGENCE.

Contributory negligence is chargeable to a boy of ten and a half years and of average intelligence, who had been frequently in the vicinity of a railway turn-table, had a general knowledge of its structure and operation, had been repeatedly warned by his father that it was dangerous to play upon it and told not to do so, and who knew that the railroad company prohibited children from going upon the turn-table, but who, nevertheless, went upon it, and played there with other boys, and was in consequence injured: *Twist v. Winona and St. P. R. R. Co.*, S. Ct. Minn., Aug. 30, 1888.

Contributory negligence will not be imputed, as matter of law, to a person injured after dark by a defect in a street, although he knew that such defect existed, but not that it was dangerous; the question is for the jury: *City of Richmond v. Mulholland*, S. Ct. Ill., Nov. 26, 1888.

County agricultural society, which has constructed seats on its fair-ground for the use of its patrons, is liable in its corporate capacity to an action for damages by a person who, while attending a fair held by it, and rightfully occupying the seats, sustains an injury by reason of the negligent construction of such seats: *Dunn v. Brown Co. Agricultural Society*, S. Ct. Ohio, Nov. 13, 1888.

Ordinary care must have been exercised by one who has been injured by the negligent operation of a machine by another, in order to entitle him to recover for the injuries sustained, even though there has been gross negligence on the part of the person causing the injury: *Willard v. Swanson*, S. Ct. Ill., Nov. 15, 1888.

Vicious animal, permitted by its owner to run at large, while trespassing in company with stock belonging to another person upon uninclosed land owned by neither, killed one of the latter's colts; the owner of the colt was entitled to recover its value, notwithstanding the fact that it was also technically trespassing upon the land of another person: *Hill v. Applegate*, S. Ct. Kan., Oct. 6, 1888.

PRIVILEGE.

Service of summons cannot be made upon a person attending the hearing of an application for an injunction in a case in which he is interested as a party, in a county other than that of his residence, while he is going to, attending, or returning from such hearing: *Andrews v. Lembeck*, S. Ct. Ohio, Oct. 16, 1888.

PUBLIC OFFICERS.

County treasurer cannot be required by *mandamus* to pay over to a railway company funds received by his predecessor for the benefit of the company and transferred by him to the county fund, in the absence of proof that the money was ever transferred to the former, or was actually or presumptively in his possession: *Minneapolis and St. L. Ry. Co. v. Becket*, S. Ct. Iowa, Sept. 8, 1888.

Fish inspector of a city, whose duty it is to inspect all fish offered for sale, and destroy such as are unwholesome and unfit to be eaten, has judicial duties and powers, and, while acting within his jurisdiction, is not liable for the careless, improper, or erroneous performance of his duties, although he knew his unfitness for the position: *Fath v. Kosppel*, S. Ct. Wis., Oct. 9, 1888.

RAILROADS.

Brakeman on freight train, in going between two cars to make a coupling, was compelled to stoop in order to avoid the projecting lumber piled on one of the cars, and stumbled, fell, and was killed; although the car was improperly loaded, the brakeman might have observed the danger, and have rightfully refused to go between the cars, and therefore the company was not liable: *Brice v. Louisville and N. R. Co.*, Ct. App. Ky., Sept. 29, 1888.

Bridge, elevated four feet nine inches above the top of a freight car, on a part of the road where brakemen are required to pass over the top of cars in applying the brakes upon moving trains, not only in the daytime, but also when the night is dark and foggy, and it would be impossible to know of the proximity of the bridge, is not a risk ordinarily and naturally incident to the service, and the company maintaining it is guilty of negligence: *Louisville N. A. & C. R. R. Co. v. Wright*, S. Ct. Ind., June 20, 1888.

Engineer was sent by the railroad employing him with one of its engines to haul temporarily for another company trains of the latter over its track, and was injured by an accident resulting from the bad condition of the latter company's track; the employer company was not liable for such injury: *Dunlap v. Richmond and D. R. Co.*, S. Ct. Ga., July 11, 1888.

Fire, originating from sparks from a locomotive, destroyed hay stacked in a field beside the railroad; the railroad was liable for the damage, unless the jury found that the employes of the railroad who were in charge of the locomotive were competent and skilful, and that the locomotive itself was properly equipped and operated: *Bulliss v. Chicago M. & St. P. Ry. Co.*, S. Ct., Iowa, Sept. 8, 1888.

WILLS.

Life estate only is given to a wife by a devise to her by her husband, who died childless, of his house and lot and "all the rest and residue" of his estate, "to have and to hold for and during the term of her natural life," although she is spoken of elsewhere in the will as the residuary legatee, and no disposition of the remainder is made: *Mixter v. Woodcock*, S. Jud. Ct. Mass., Nov. 27, 1888.

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THE LAW RELATING TO TELEPHONES.

I.

THE term telephony was first used in a lecture given by Philip Reis, in Frankfort, Germany, in 1861 ; and is defined as the art of reproducing sounds at distances from their source. 23 Ency. Brit. 127.

“In a general sense, the name ‘telephone’ applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. The speaking tubes used in conveying the sound of the voice from one room to another in large buildings, or stretched cords or wires attached to vibrating membranes or disks by which the voice is carried to distant points, are, strictly speaking, telephones. But since the recent discoveries in telephony, the name is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and wires, similar to telegraphic wires. In a secondary sense, however, and being the sense in which it is most commonly understood, the word ‘telephone’ constitutes a generic term, having reference generally to the art of telephony as an institution, but more particularly to the apparatus, as an entirety, ordinarily used in the transmission as well as reception of telephonic messages :” NIBLACK, C. J. *Hockett v. State* (1885), 105 Ind. 250 ; s. c. 24 AMERICAN LAW REGISTER, 325.

It has been expressly held that telephones are within the meaning of the word “telegraph” as used in a statute, and

within the scope of laws enacted for the regulation of telegraphic communication, even though such laws were passed before the telephone was invented: *Wis. Tel. Co. v. Oshkosh* (1884), 62 Wis. 32; *Attorney-General v. Edison Tel. Co.* (1880), L. R. 6 Q. B. D. 244.

II.

Telephones could not become of much value until the wires transmitting the sound from instrument to instrument were of some considerable length, passing over or through the property of others, not interested in the use of the instrument. These wires will need supports, hence the erection of poles or other structures becomes necessary. Being identical in this respect to telegraph lines and poles, the same rules have been applied to telephone lines and poles. The transmission of intelligence by electricity is a business of public character, to be exercised under public control, in the same manner as transportation of goods or passengers by railroad. In *Hockett v. State, supra*, it was said, "The telephone is one of the remarkable productions of the present century, and, although its discovery is of recent date, it has been in use long enough to have attained well defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage-coach and sailing vessel a hundred years ago, or as the steamboat and the railroad have become in later years. It has already become an important instrument of commerce. No other device can supply the extraordinary facilities which it affords. It may therefore be regarded, when relatively considered, as an indispensable instrument of commerce."

As the construction of telegraph poles and lines, so the construction of telephone lines and poles is a public use, for which the right of eminent domain may be exercised: *N. O. M. & T. R. R. Co. v. Southern & Atl. Tel. Co.* (1875), 53 Ala. 211; *Pierce v. Drew* (1883), 136 Mass. 75; *State et al. v. Am. & Europ. C. News Co.* (1881), 43 N. J. L. 381. And there is no doubt that the telephone, including all appendages incident to its use, is of such a public character, that the right exists to appropriate private property for its use, upon compensation

being granted the owner, whenever necessary for the convenience of the public.

III

Whether the erection of the poles on the highway is such an additional burden upon the fee that the owner is entitled to additional compensation for such use, is a question upon which the courts are not united in their conclusions.

The weight of authority is that it is an additional burden, and that compensation must be made to the owner of the fee. There seems to be but one Court of eminence holding the opposite; that being the Supreme Court of Massachusetts. *Pierce v. Drew*, *supra*. See to same effect, note to *Hockett v. State*, in 25 AMERICAN LAW REGISTER, 327-8. In *Gay v. Mutual Union Tel. Co.* (1882), 12 Mo. App. 485, 494, the right of the Legislature to authorize the use of public highways for the erection of telegraph poles was conceded, and the case turned on the question of special damages from obstruction by a particular pole.

Other cases which seem to hold the opposite, upon closer examination will be seen to decide that, where the fee of the street or highway is in the public, the erection of telephone lines and poles is not such a perversion of the public use as to require compensation to be made to abutting land-owners: *Irwin v. G. S. Tel. Co.* (1885), 37 La. Ann. 63. The principle to be extracted from the cases was one of the points in *Story v. N. Y. Elevated R. R. Co.* (1882), 90 N. Y. 122, 124; that no structure can be authorized upon land owned by a city in fee for a street or highway, which is inconsistent with its continued public use as an open street. This was affirmed, not only as to all questions involved in that case, but also as to such as logically come within the principle therein determined: *Lahr v. Met. El. R. R. Co.* (1887), 104 N. Y. 268; where the abutting landowners were also owners of the fee of the street. It was held that compensation must be made for any use of the street not contemplated at the creation of the easement and not considered within the ordinary and usual use of a street or highway.

Smith v. Central Dist. Print. & Tel. Co. (1887), 2 Ohio Circ.

Ct. 259, is a case in point. "It is said that this is an improved method for the transmission; that under the old way, intelligence was transmitted by mail and by post-boy over the highways, and that this is but an improved method; that, therefore, it was within the originally contemplated user, and the public have the right to authorize such use of it. * * *

Upon the question where lays the weight of authority, we have a divided Court in Massachusetts, five to two" (*Pierce v. Drew, supra*); "we have a decision of the Supreme Court of Illinois" (*The Board of Trade Tel. Co. v. Barnett* (1883), 107 Ill. 507), "holding that it cannot be done without compensation, and we have two decisions in the State of New York, one by the Supreme and the other by the Superior Court of that State, holding that it is an additional burden. * * *

In Ohio, while the public may authorize the erection of telegraph or telephone poles along and upon the highways, so as not to interfere with the public use, at the same time, that does not authorize their construction as against the rights of adjoining lot or land-owners; but such erections and constructions are an additional burden upon the fee of the land, which must be first appropriated or acquired by contract before they may be taken." The same conclusion was reached by the Supreme Court of Minnesota, on an affirmance by a divided Court, in *Willis v. Erie T. & T. Co.*, October 7, 1887.

IV.

The construction of a telegraph or telephone line along the right of way of a railroad is the taking of the company's railroad property, for which the railroad is entitled to compensation: *Atlantic & Pacific Tel. Co. v. Chicago, R. I. & P. R. R.*, U. S. C. Ct. N. Dist. Ill. (1874), 6 Biss. C. C. 158; *Southwestern R. R. Co. v. Southern & Atl. Tel. Co.* (1872), 46 Ga. 43.

A railroad company may construct a telegraph or telephone line along its own route for its own use, and may cut standing trees on its right of way, without incurring any additional liability to the original owner of the land for compensation. If, however, the line is erected by another company, that company

is liable to the landowner for the damages to the land caused by such line. The same rule applies even if it is used jointly by the company putting it up and the company owning the route: *Western U. Tel. Co. v. Rich* (1878), 19 Kan. 517.

V.

Whether the mere stretching of a telephone wire, through the air, over the premises of another, is an illegal use of the property of the owner of the premises, has never been directly decided by the Courts. In all cases adjudicated, the question of the erection of poles entered into the consideration of the Court. The question, however, requires an answer in the affirmative.

Blackstone says: "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cælum*, is the maxim of the law; upwards, then, no man may erect any building or the like to overhang another's land:" 2 Comm. *18. Lord ELLENBOROUGH remarks that he remembers a case in which he held that the firing a gun, loaded with shot, into a field, was a breaking the close, and then puts the query whether trespass would lie for passing through the air, in a balloon, over the land of another: *Pickering v. Rudd* (1815), 4 Camp. 219.

In reference to this, a learned author (Pollock on Torts, *281), says: "It does not seem possible on the principles of the common law to assign any reason why an entry at any height above the surface should not also be a trespass. The improbability of actual damage may be an excellent practical reason for not suing a man who sails over one's land in a balloon; but this appears irrelevant to the pure legal theory. * * * Then one can hardly doubt that it might be a nuisance, apart from any definite damage, to keep a balloon hovering over another man's land; but if it is not a trespass in law to have the balloon there at all, one does not see how a continuing trespass is to be committed by keeping it there. Again, it would be strange if we could object to shots being fired across our land only in the event of actual injury being caused, and the passage of the foreign body in the air above our soil being thus a mere incident in a distinct trespass to person or property."

In the case of *Board of Works v. United Telephone Co., Limited* (1884), L. R. 13 Q. B. 904: the question was whether the Board of Works for a particular district of London were entitled to an injunction to prevent a telephone company from carrying their wires diagonally across the street, at the level of the chimneys, the owners of the houses not objecting and there being neither a nuisance nor appreciable danger. The injunction was allowed by the lower Court, but the upper Court held, that, as the Board did not own the fee, and no nuisance or appreciable injury threatened, the decree was erroneous and the injunction was dissolved.

VI.

It has been generally held that the telephone, like the telegraph, is a common carrier, and is bound to treat all alike. Perhaps the earliest case upon this particular question is that of *American Union Tel. Co. v. Bell Tel. Co.* (1880), 24 AMERICAN LAW REGISTER, 578; where the telegraph company applied to the telephone company for an instrument to be placed in its office. The telephone company refused, and a mandamus was asked for and granted, compelling them to do so. In a similar case, the Court said: "The defendants are a quasi-public servant, and as such bound to serve the general public on reasonable terms and with impartiality. They are governed by the principle of the law of common carriers:" *Louisville Transfer Co. v. Am. District Tel. Co.* (1881); 24 AMERICAN LAW REGISTER, 579. In *Chesapeake & P. Tel. Co. v. B. & O. Tel. Co.* (1886), 66 Md. 399, holding a similar view, the Court said: "The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable rules and regulations for the government of their offices and those who deal with them; but they have no power to discriminate, and while offering readily to serve some, refuse to

serve others. The law requires them to be impartial and to serve all alike, upon compliance with their reasonable rules and regulations."

In all of these cases, one reason why telephone companies ought not to be bound to furnish rival companies, such as a telegraph company, the use of their instruments, was, that to compel them to do so, would be to injure their rights, lessen their income, and that their instruments were protected by patents and they had full privileges to use them as they chose. Upon this point BREWER, J. said: "A telephonic system is simply a system for the transmission of intelligence and news. It is, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. * * * The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service." *State ex rel. v. Bell Tel. Co.* (1885), U. S. C. Ct. E. Dist. Mo., 24 AMERICAN LAW REGISTER, 573. TREAT, J., dissented on the ground that the license from the patentee forbade the company to deal with any other than the Western Union Telegraph Company, citing *American R. Tel. Co. v. Conn. Tel. Co.* (1881), 49 Conn. 352; where it was so held, and a mandamus was refused.

In *State ex rel. v. Bell Tel. Co.* (1880), 36 Ohio St. 296, a contract between a telephone company and the owner of telephone instruments, providing for discrimination in service rendered to different telegraph companies, was held to be void as against public policy, as declared by chapter four of the revised statutes of that State. The same decision was rendered in *Chesapeake & P. Tel. Co. v. B. & O. Tel. Co.*, by the Court of Appeals of Maryland (1887), 66 Md. 399; and *Bell Tel. Co. v. Comm. ex rel. Tel. B. & O. Tel. Co.*, by the Supreme Court of Pennsylvania, April, 1888.

VII.

What has been said above, in reference to discrimination against rivals, will apply equally to individuals. A case in point is *State v. Nebraska Tel. Co.* (1885), 17 Neb. 126 ; s. c. 24 AMERICAN LAW REGISTER, 263, in which it appeared that in the year 1883 the respondent placed an instrument in the office of the relator, but for some reason failed to furnish him with a directory of its subscribers in Lincoln and other various cities and villages within its circuit, which the relator claimed was essential to the profitable use of the telephone, and which it was the custom of respondent to furnish its subscribers. Finally, the directory was furnished, but the relator refused to pay for the use of the telephone during the time the respondent was in default with the directory. Neither party being willing to yield, the instrument was removed, and soon afterwards the relator applied to the agent of the respondent, and requested to become a subscriber, and have an instrument placed in his place of business, which request respondent refused. It was insisted that the conduct of the relator relieved the respondent from such liability. The Court compelled them to put the instrument in again, remarking: "We cannot see that the relation of the parties to each other can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone, the law gives it an adequate remedy by an action for the amount due." It was here held that mandamus was the proper action.

VIII.

In 1885, the Legislature of Indiana passed a law limiting the price to be charged to three dollars per month where one telephone only is rented by one person, and two dollars and fifty cents where two or more are rented to same individual. (See *infra*.) The telephone company, on several different grounds, claimed that the law was unconstitutional.

In a very able opinion, the Supreme Court of that State said: "It is first and most earnestly contended that as the articles used by the company as above are under the Con-

stitution and laws of the United States, the Legislature of a State has no power to limit the price, use, sale, or rental value of such articles, and that as a consequence, all Acts of a State Legislature of the class to which the one before us belongs, are inoperative and ineffectual for any practical purpose. Conceding the force as well as plausibility of many of the arguments and illustrations used by counsel, the ready and indeed inevitable answer is that the question thus presented ought no longer to be regarded as an open question. There is a reserved and at the same time well-recognized power, affecting their domestic concerns, remaining in all the States, which the government of the United States cannot and seldom has attempted to invade. This power, so varied and comprehensive that an exact definition, as applicable in all its phases, has so far been found to be impracticable, but the instances in which the existence of such a power has been judicially recognized in particular cases are quite numerous, as well as various in their application to our complex system of government. This reserved power is usually, though perhaps not always accurately, denominated the police power of the State, and embraces the entire system of internal State regulation, having in view not only the preservation of public order by the prevention of offences against the State, but also the promotion of such intercourse between the inhabitants of the State as is calculated to prevent a conflict of rights and promote the interests of all:" *Hocket v. State* (1886), 105 Ind. 250; S. C. 25 AMERICAN LAW REGISTER, 819. A month later a second case came before the same court and was decided in the same manner: *Hocket v. State* (1886), Id. 599. And on March 23, 1886, the same court decided (*Central Union Tel. Co. v. State ex rel.*) that the right to the use of a telephone and service, at rates fixed by the Legislature, might in a proper case be enforced by a writ of *mandamus*.

IX.

Parties can only compel permission to use an instrument so long as they use it in a proper manner, obeying all reasonable rules. In a case where one of the rules was that no improper language should be used, and the user becoming exasperated at a reply of the operator, when attempting to call

up some one, said to the operator: "If you don't get the party I want, you can shut up your damned old telephone,"—this was held to be improper language, and the company were justified in refusing the complainant longer use of the instrument. The Court say: "If indecent or rude or improper language was permitted, evil and ill-disposed persons would have it in their power to use it as a medium of insult to others, and perchance by some accident, such as the crossing of wires, or by a species of induction, the same communication might be launched into the midst of some family circle under very mortifying circumstances. The management of the telephone requires the observation of common propriety in the use of language, because in many cases the operators at the exchange are refined and well disposed females. In fact, all operators, whether male or female, have a right to be respected, and be protected from insult and annoyance. Society demands the conduct of all business with decency and propriety. *Field on Corp.*, 669–70." There was a dissenting opinion in this case in which the judge held the language not *improper* under the circumstances: *Pugh v. City and Suburban Tel. Co.*, 9 Bull. 104 (Cin. Dist. Court, Ohio).

X.

Some new, intricate, and very interesting questions are certain to arise by the use of the telephone. But one has yet received the attention of a Supreme Court and that was decided by a divided Court: *Sullivan v. Kuykendall* (1885), 82 Ky. 483; s. c. 24 AMERICAN LAW REGISTER, 442. In this case, Sullivan, desiring to talk over the telephone with Kuykendall, asked the operator to call him, and the operator thereupon had a conversation with K., reporting to S., who was standing by, what K. said as it came over the wire. In a subsequent action between S. and K., it was held that the former might prove by himself and others what the operator reported to him as coming from K., the operator being called and not remembering the conversation.

This doctrine was violently disputed in a dissenting opinion by PRYOR, J., and in a note by M. D. EWELL.

WILLIAM M. ROCKEL.

Springfield, O.

XI.

The statutes of the various States and territories relating directly to telephone companies are subjoined. The statutes relating to the telegraph extend also to the telephone (*supra*), but are too numerous for citation here.

The State of Alabama has enacted (Code of 1887)—

§ 454. There shall also be assessed by the assessor in each county, for taxation, the following subjects at the following rates:—

6. On the gross amount of the receipts by any and every telegraph, telephone, and express company, derived from the business done by it in this State, at the rate of two dollars on the hundred dollars.

§ 508. The president, secretary, or manager of every telephone company, owning or operating lines, must annually, on or before the first day of May, make under oath to the assessor of the county in which such instruments are located, or such lines are operated, a return of the property, and receipts required by this article to be made by the officers or agents of telegraph companies to the auditor; and in case such return is not made by any company within the required time the assessor must ascertain, from the best information he can obtain, the amount and value of such property, and the amounts of such receipts; and on the property and receipts so returned or ascertained, the assessor shall assess the taxes against such company; and when there has been a failure on the part of any company to make a return of such property and receipts within the required time, the assessor shall add to the assessment against such company a penalty of fifty per cent. on the amount thereof. Such assessment, as well as the assessment of other taxable property of such company in the county, must be entered by the assessor in the book of assessments.

§ 504. The president, secretary, auditor, or managing agent in this State of every telegraph company whose line, or any part thereof, is within the State, must annually, on or before the first day of April of each year, make, under oath, to the auditor, a return of the number of miles of telegraph wire in the State belonging to such company, and the value thereof, and the number of poles, batteries, instruments, and articles of all kinds in the State connected with its business, and the value thereof, specifying the several counties in which such property is situated, and the value of the property situated in each of such counties, and also the gross receipts of such company from its business done in the State during the preceding year; and if any of such companies, its officers, or agents fail to make such return within the time specified, the auditor must ascertain such items of property, values, and receipts from the best information he can obtain.

§ 3219. A telegraph or telephone company, incorporated under the laws of another State, proposing to extend connecting lines into this State, may acquire an easement for the uses and purposes of such connecting lines, and may pursue the mode of proceeding prescribed in this article.

[That is, for the condemnation of lands for public uses.]

Arkansas has enacted (Digest, 1883)—

§ 5645. Gas, telephone, bridge, street railroad, savings banks, mutual loan, building, transportation, construction, and all other companies, corporations, or associations, incorporated under the laws of this State, or under the laws of any other State, and doing business in this State, other than insurance companies and the companies and corporations whose taxation is in this Act specifically provided for, in addition to their property required by this Act to be listed, shall, through their president, secretary, principal accounting officer, or agent annually, during the month of March, make out and deliver to the assessor of the county where said company or corporation is located or doing business, a sworn statement of the capital stock, setting forth particularly:—

First. The name and the location of the company or association.

Second. The amount of capital stock authorized, and the number of shares into which such capital stock is divided.

Third. The amount of capital stock paid up, its market value, and if no market value, then the actual value of the shares of stock.

Fourth. The total amount of all indebtedness, except indebtedness for current expenses, excluding from such indebtedness the amount paid for the purchase or improvement of the property.

Fifth. True valuation of all the tangible property belonging to such company or corporation; such schedule shall be made in conformity to such instructions and forms as may be prescribed by the auditor of public accounts.

§ 5646. The assessor shall annually, at least ten days before the twenty-eighth day of February, deliver to the president, secretary, accounting officer, or agent of any such company, corporation, or association located in or doing business in such county, a notice in writing to return such schedule by the twenty-first day of March next ensuing. Any president, secretary, principal accounting officer, or agent of any such companies or corporations, upon whom such notice shall have been served, wilfully neglecting or refusing to make such return by the twenty-first day of March next ensuing, after delivery of said notice, shall be guilty of a misdemeanor, and upon conviction, shall be fined in any sum not exceeding one hundred dollars, or imprisoned not exceeding three months, or both, and the assessor shall, from the best information he can obtain, make out and enter upon the proper assessment-roll a list with the valuation of all tangible and intangible property belonging to such defaulting company or corporation subject to taxation by the provisions of this Act, with fifty per cent. penalty.

Connecticut has enacted (Gen. Stat., Revision of 1887)—

§ 3943. No person or corporation building and maintaining telegraph, telephone, or electric light or power wires or fixtures, or electrical wires, conductors, or fixtures of any kind in this State, shall, by reason of any occupation or use of any buildings or lands for the support of the wires of said person or company, or by reason of said wires passing over or through any buildings or lands, acquire by the continuance of such use or occupation, any prescriptive right to so occupy or use the same.

§ 3944. Every telegraph or telephone company may maintain and construct lines of telegraph or telephone upon any highway, or across any waters in this

State, by the maintenance and erection of the necessary fixtures, including posts, piers, or abutments for sustaining wires ; but the same shall not be so constructed as to incommode the public travel or navigation, nor to injure any tree without the consent of the owner ; nor shall such company construct any bridge across any waters ; and said lines shall be personal property.

§ 3945. No telegraph, telephone, or electric light company or association, nor any company or association engaged in distributing electricity by wires or similar conductors, or in using an electric wire or conductor for any purpose, may hereafter exercise any powers which may have been conferred upon it to erect or place wires, conductors, fixtures, structures, or apparatus of any kind over, on, or under any highway or public ground, or to change the location of the same, without the consent of the adjoining proprietors, or in case such consent cannot be obtained, without the consent in writing of two of the County Commissioners of the county in which it is desired to exercise such powers, which shall be given only after a hearing upon due notice to such proprietors ; and the fees of such commissioners shall be paid by such company.

§ 3946. The selectmen of any town, the common council of any city, and the warden and burgess of any borough shall, subject to the provisions of the preceding section, within their respective jurisdictions, have full direction and control over the placing, erection, and maintenance of any such wires, conductors, fixtures, structures, or apparatus, including the re-locating or removal of the same, and including the power of designating the kind, quality, and finish thereof, and may make all orders necessary to the exercise of such power of direction and control, which orders shall be in writing and recorded in the records of their respective communities, but shall be subject, nevertheless, to the right of appeal by said company to a judge of the Superior Court, who, after a hearing, upon due notice to all parties in interest, shall, as speedily as possible, determine the matter in question, and affirm, modify, or revoke said order.

§ 3947. Any judge of the Superior Court may at any time make any proper order with reference to the erection, placing, or maintaining of any such wires, conductors, fixtures, structures, or apparatus, including the relocating and removal thereof, and may review any decision of the County Commissioners rendered under the provisions of section 3945, upon the application of the State's Attorney of that jurisdiction, or of any party interested, upon a hearing, after due notice to all parties concerned.

§ 3948. Any judge of the Superior Court may, upon the application of any party interested, and after due notice, unless the application has been unreasonably delayed, appoint three disinterested persons to make a written appraisal of all damages which may be due to any person by reason of anything which may have been done under any or all of the four preceding sections ; and said appraisal, when approved by such judge, shall be returned to and recorded by the clerk of the Superior Court in the county where the cause of action arose, and thereupon the sum specified therein shall be paid immediately by the company to the party entitled to the same ; or the judge may order the same to be paid immediately into the hands of said clerk, to be delivered by him on demand to said party ; and the costs of such proceeding shall be taxed by said judge

and paid by said company, and he may issue execution therefor and for such damages.

§ 3949. When it shall be necessary to cut or otherwise disconnect the wires of telegraph, telephone, electric light, or other company or association hereinbefore referred to, or to remove them from the poles or fixtures to which they may be attached for the transportation of any objects on the highways or upon any waterways, any person may do so, exercising reasonable care therein; provided, that before doing so he shall leave a statement, in writing, particularly describing the time when and the place where he wishes to disconnect such wires, at the office of such company, if any there be in the town where such place is situated, twenty-four hours before the time so stated; and if such company has no office in the same town, he shall send such statement to its office nearest to the place named therein by putting it into the post office, properly directed and stamped, three days before the time stated therein.

§ 3951. The stockholders of every telegraph, telephone or electric light or power company, organized under the laws of this State, shall be jointly and severally liable for the payment of all its debts contracted during the time of their holding stock therein, to the extent of twenty-five per cent. of the amount of stock held by them respectively, if a judgment thereon shall have been obtained by the claimant against the company, and an execution thereon shall have been returned unsatisfied, or if such company shall be dissolved.

§ 3952. Telegraph or telephone companies shall receive dispatches from any person, and for other telegraph or telephone lines, and shall transmit them in the order of time in which they are received, on payment of their usual charges, under the penalty of one hundred dollars for every neglect so to do, to be recovered with costs by the party aggrieved; but arrangements may be made with publishers of newspapers for the transmission of news out of its general order, and all communications for officers of justice shall take precedence of all other dispatches.

§ 3954. The mortgage by any telegraph or telephone company to secure its bonds, or other evidences of indebtedness of all or any part of its lines, appliances, machines or machinery, whether owned by it at the date of said mortgage, or those thereafter to be acquired by it, or both, shall be valid and effectual as respects all the property therein included as aforesaid, and may be foreclosed in the same manner as mortgages of real estate, and the record thereof, in the office of the secretary of the State, shall be a sufficient record and notice to protect the title under the mortgage, notwithstanding such company may remain in possession of all or any part of the mortgaged property.

Dakota has enacted (Compiled Laws, 1887)—

§ 3025. There is hereby granted to the owners of any telegraph or telephone lines operated in this Territory, the right of way over lands and real property in this Territory, and the right to use public grounds, streets, alleys, and highways in this Territory, subject to the control of the proper municipal authorities as to what grounds, streets, alleys, or highways said lines shall run over or across, and the place the poles to support the wires are located; the right of way over real property granted in this Act may be acquired in the same manner and by like proceedings, as provided for railroad corporations.

Illinois has enacted by a law in force from July 1, 1888 (Laws, p. 173 ; Rev. Stat. 6th ed. p. 1471)—

§ 1. It shall be lawful for any person or persons living on the line of any public highway, street, or alley, outside of any incorporated city, village, or town in this State, or on any private road leading to such highway, street, or alley, to construct, operate and maintain a line, or lines, of telegraph or telephone extending from house to house, as the parties interested in the construction of such lines may desire.

§ 2. For the purpose of constructing and maintaining such lines of telegraph or telephone, the parties in interest may set the necessary poles or posts on which to place the wires and insulators of such lines, in any of the public streets, highways, or alleys, or in any private road leading to such highways, streets, or alleys outside of the incorporated cities, villages, or towns in this State, along which such lines may pass ; *provided*, such poles or posts shall be placed along the boundaries of such highways, streets, or alleys, at such distances therefrom as the authorities having control thereof may direct ; *and provided further*, that the wires necessary for such lines shall not be less than fifteen feet above the ground along such boundaries, and not less than twenty feet at any public or private crossing, and shall be so placed as not in any manner to interfere with such crossing.

§ 3. Any person who shall unlawfully and intentionally injure, molest, or destroy any of said lines, or the material or property belonging thereto, or shall in any manner interfere with the proper working of such lines, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding one hundred dollars ; said fine to be recoverable in any Court having jurisdiction of the same ; *provided*, that prosecution under the foregoing provision of this section shall not, in any manner, prevent a recovery by the person or persons entitled thereto, of the amount of damages done to such lines.

Illinois has also enacted, by a statute in force from July 1, 1887 (Laws, p. 298 ; Rev. Stat. 6th ed. p. 1472), that—

§ 1. Whenever any wire, pole, or cable used for any telegraph, telephone, electric light, or other electric purpose, or for the purpose of communication, is or shall be attached to, or does or shall extend upon or over any building or land, no lapse of time whatever shall raise a presumption of any grant of, or justify a prescriptive right to, such attachment or extension.

Indiana has enacted, by a statute in force from April 7, 1881 (Rev. Stat. ed. 1888, chap. 43, §§ 4181, 4192)—

§ 1. Any number of persons may form themselves into a corporation for the purpose of establishing, maintaining, and operating telephones, telephone lines, and telephone exchanges within the State of Indiana, by complying with the requirements of this Act.

§ 2. They shall join in the execution of articles of association, setting forth the name assumed, the counties or places within which such company proposes to establish, maintain, and operate telephones and telephone exchanges, the

amount of capital stock, and the number of shares into which it is divided. The stockholders who incorporate such association shall each sign such articles, giving his place of residence and the amount of stock subscribed for by him, five of whom (if there be so many signers) shall acknowledge the execution of such articles before some officer authorized to take acknowledgments of deeds, and the articles shall thereupon be recorded in the office of the Secretary of State.

§ 3. As soon as such articles are filed for record in the office of the Secretary of State, such company shall be deemed and held to be a corporation, by the name specified in the articles of association, and in its corporate name shall be capable of suing and being sued, pleading and being impleaded, defending and being defended, in any Court of competent jurisdiction.

§ 4. The stockholders shall elect, from among their number, not less than three nor more than nine directors, a majority of whom shall be residents of this State, who shall hold office for one year and until their successors are elected. Notice of the election of directors shall be given by publication, for two weeks successively, in some newspaper published in the county in which the principal office is located.

§ 5. The principal office of said company shall be maintained in this State. The board of directors shall organize within ten days after said election, by choosing one of its members president (who may also be superintendent), and a secretary and a treasurer (which two offices may be filled by the same person), and such other officers as may be necessary.

§ 6. The board of directors shall adopt by-laws for the government of the corporation and management of its business; and shall cause to be kept a full and complete record of its proceedings, in a book provided for that purpose; and such record, or copies duly proved, may be read in evidence when the interests of the corporation are concerned.

§ 7. Such company may have a common seal, which may be altered at pleasure, and shall have power to acquire, by purchase or otherwise, and hold and convey, such real and personal estate as may be proper for the purpose of erecting and maintaining its lines of telephone and the appliances and buildings requisite for its business; and shall have the right to acquire such real estate and rights of way as may be necessary for its business, under the writ of assessment of damages, as fully as if the Act in relation to said writ were incorporated in this Act and made part of the same. The life of a corporation organized under this Act shall be limited to fifty years.

§ 8. Any telephone company organized under this Act shall have power to lease, or attach to other telephone lines or exchanges by lease or purchase.

§ 9. A railroad company may become a stockholder in any telephone or telephone exchange company.

§ 10. A telephone company shall not be liable for errors in messages or communications, except when such messages or communications are transmitted under contract directly by the agents or employes of the company; nor shall it be liable for any special damage sustained by a failure of its instruments to work, beyond a rebate of the rent charged for the time such instruments failed to work.

§ 11. The board of directors shall have power to make assessments, from time to time, on the stock to the extent, in the aggregate, of its face value,

for the purpose of repairing or extending its lines ; and it may also, with the consent of a majority of the stockholders, increase the capital stock for the purpose aforesaid. It may also, in its by-laws, determine the manner in which the stock of the company shall be held and assigned.

§ 12. Every stockholder shall be liable in his individual capacity, for any contract, debt, or engagement of such company to an amount over and above his stock, equal to the face value of his stock.

Indiana has also enacted by a statute in force from February 13, 1883 (Laws, p. 9 ; Rev. Stat. ed. 1888, chap. 43, § 4192, d.) :—

§ 1. Any operator, clerk, servant, messenger, or employé of any telephone company doing business in this State, who discloses the contents of any dispatch, or message, or any conversation had between persons while using the line of any telephone company, except to a Court of justice, or to a person entitled to know the same, shall be fined not more than five hundred dollars, nor less than ten dollars.

JOHN B. UHLR.

(To be continued.)

RECENT ENGLISH CASE.

High Court of Appeals.

BUTLER v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Where a by-law of a railway company provides that a passenger failing or refusing to show or deliver up his ticket, when requested by a duly authorized agent of the company, shall be required to pay his fare from the station whence the train started, but such by-law makes no provision for enforcing this requirement, a passenger who has bought a ticket on condition of compliance with the by-laws, and has lost it, cannot be removed from the train for refusing to comply with such by-law.

The right to remove a passenger for non-compliance with such a by-law cannot be implied as part of the contract of carriage.

Semble, per Lord Esher, M. R., that the by-law in question is not reasonable.

Semble, per Lopes, L. J., that no regulation providing for removal of a passenger from a train, for non-compliance with such a by-law, could be framed.

APPEAL from a judgment of MANISTY, J., in the Queen's Bench Division, at the trial of an action for assault.

The plaintiff had taken a ticket from Sheffield to Manchester and back, the ticket being marked, "subject to the conditions contained in the company's time-tables and advertisements." One of these conditions was a by-law stating

that any passenger refusing to show or deliver up his ticket, when requested by the duly authorized servant of the company, should be required to pay the fare from the station, whence the train originally started, to the end of the journey. Other by-laws provided that persons intoxicated, or using bad language, or smoking in carriages not provided for that purpose, should be removed from the company's carriages. On his return journey, just before reaching Sheffield, the plaintiff was requested to produce the return-half of his ticket, but could not do so, having lost it. He declined to pay the ordinary fare from Manchester, and offered his name and address. He refused to alight from the carriage, and was removed by force. MANISTY, J., gave judgment for the defendants, holding it to be an implied term of the contract that, if the passenger failed to produce his ticket, his right to be carried ceased, and that he might be removed from the carriage.

Waddy, Q. C., and Lawson Walton, for the plaintiff.

Lockwood, Q. C., and Cyril Dodd, for the defendants.

LORD ESHER, M. R. In this case the plaintiff, who was a passenger by the defendants' railway, had paid for a ticket, but had lost it. At a certain stage of the journey he was asked to produce his ticket, and, not being able to do so, was told that he must pay the ordinary third class fare from Manchester to Sheffield. He refused to do so, and thereupon the defendants' servants assumed the power of pulling the plaintiff forcibly out of the railway carriage in which he was travelling. The plaintiff brings an action of assault against the defendants for this action of their servants; and the defendants assert that they were justified in removing the plaintiff from their carriage by force, using no more force than was necessary for the purpose of overcoming his resistance. The defendants put it that the plaintiff was unlawfully upon their premises, and it is admitted that the allegation that he was so is material to their defence. The question, therefore, is whether it is true that he was unlawfully on their premises. I do not think that is made out. What is the nature of the relation between the plaintiff and the defendants? It is, as it appears to me, a contractual relation.

It was alleged that the contract was for a right to go on the defendants' land in the nature of an easement, but that, there being no grant of an easement under seal, there was only a license given by the defendants to go on their premises, which they could revoke. All I will say with regard to that contention is that, though it may have been quite right for the defendants' counsel to suggest the point, it seems to me, when considered, to be contrary to good sense. To say that a passenger by railway from London to Liverpool is to have an easement all over the line between those places seems to me really ridiculous; and the absurdity of such a view of the case becomes greater when we remember that companies often contract to convey passengers over the lines of other companies. It seems to me, therefore, that the considerations upon which the case of *Wood v. Leadbitter* (1845), 13 M. & W. 838, turned are not applicable in this case. The contract between the plaintiffs and defendants really is that, on his paying the fare for the journey, they will carry him in their carriage on the journey, for which he has so paid the fare, using due care for his safety while so doing. That contract may be subject to conditions by reason of notice given to that effect upon the ticket incorporating such conditions. In this case it is said that the ticket referred to certain conditions, and thereby incorporated them into the contract. The only conditions which can be alleged to be so incorporated into this contract are the by-laws and regulations which the company made in pursuance of the authority given them for that purpose by statute. They can only make by-laws and regulations in pursuance of their statutory powers, and accordingly we find that they assume to make certain by-laws and regulations as required under Railways Clauses Consolidation Act, 1845, viz: under the seal of the company and with the approval of the Board of Trade, and such regulations are the only conditions which can be looked on as incorporated by reference, by this ticket. One of such by-laws and regulations provides that, "Every passenger shall shew and deliver up his ticket to any duly authorized servant of the company when required to do so for any purpose; and any passenger travelling without a ticket, or failing or refusing to shew or deliver

up his ticket as aforesaid, shall be required to pay the fare from the station, whence the train originally started, to the end of his journey." I do not think it is necessary for the purposes of this case to discuss the question whether that is a valid or reasonable regulation, or how far the plaintiff would be bound by it if unreasonable. It would seem, if the decision in *Saunders v. South Eastern Ry. Co.* (1880), L. R. 5 Q. B. D. 456, be correct, not to be reasonable. Whenever it becomes necessary we must deal with that question, but I think we may, for the present purpose, assume that the condition is reasonable. The effect of it is that the passenger is under an obligation to show his ticket when asked to do so, and if he fails to do so, a certain consequence is to follow, viz: that he must pay the fare from the station whence the train started. But suppose that he refused to do so, he no doubt breaks his contract; but does it result that the company's servants may lay hands on him and remove him from the carriage? I do not think that it does. The remedy is by proceeding against him for the amount of the fare he refuses to pay. Where is there any contract by which he has agreed that, if he fails to show a ticket or to pay the fare mentioned in the regulation, the company may lay hands on him, and put him out of the carriage by force? No one has any right to lay hands forcibly on a man in the absence of some legal authority to do so, or some agreement to that effect. It is argued that such right on the part of the company must be implied, but no Court has a right to imply any term as between parties which was not clearly and obviously within the contemplation of both the parties, and I cannot agree with the learned Judge in the Court below in holding that such a term should be implied. For these reasons I think his decision was wrong, and that the appeal should be allowed, and judgment entered for the plaintiff.

LINDLEY, L. J. I am of the same opinion. The question raised by this case is one of great importance both to the company and the passenger. One knows that railway companies may be placed in great difficulty by the unscrupulous attempts of fraudulent persons to cheat them; and I do not desire to

express any opinion one way or the other on the question whether or not some condition might be made, which, if properly worded, would justify the company in future in taking the course they claimed to take in the present case. There does not seem to me to be any by-law or regulation in this case which authorized the company to remove from their carriage a passenger who failed to produce his ticket. That consideration seems to me to be the key to the whole case. How can the company justify laying hands on the plaintiff? The plaintiff had taken his ticket, and the effect was that there was a contract by the company to carry him to Manchester and back. There is no authority as yet to the effect that such a contract of carriage is a contract for an interest in land. It seems to me to be a totally different thing from a contract for an interest in land; and it seems to me absurd to test the case as one of a revocable license. It is a case of a contract for carriage. The doctrine of *Wood v. Leadbitter*, *supra*, does not appear to me to be at all applicable to the case of such a contract. Supposing that the contract of carriage involved a contract for production of the ticket or payment of another fare, and the plaintiff broke that part of the contract, does it follow as a matter of law that the defendants could turn him out of the carriage? The remedy is to take proceedings for the breach of contract on his part. It is argued that having broken the contract he was no longer lawfully on the defendants' premises. I do not see that that consequence follows. It does not appear to me that the contract between the plaintiff and the defendants was cancelled by reason of the plaintiff's breach of contract. In my opinion the defendants failed to show that the plaintiff was unlawfully upon their premises, and therefore they had no right to remove him therefrom by force. For these reasons I agree that the appeal should be allowed.

LOPES, L. J. It is somewhat extraordinary that there should be no authority on such an important point as that raised in the present case. To my mind the case is very clear. In the first place, it is to be observed that there is no by-law or regulation which can be relied on as protecting the defend-

ants in respect of what their servants did in this case. Whether any regulation could be framed which would do so, I doubt; but it is unnecessary to express any opinion as to that, because there is no such by-law or regulation in this case. That being so, the question is whether the company's servants were justified, in the absence of any such by-law or regulation, in laying hands on the plaintiff as they did. The plaintiff had, admittedly, properly taken his ticket for the journey from Sheffield to Manchester and back, and had paid the full fare for the journey, and admittedly he had lost his ticket, accidentally. The effect is, to my mind, that he was lawfully in the defendants' carriage. It seems to me sufficient to state so much to show that the defendants were not justified in assaulting him as they did. It is argued that there was a breach by him of an implied contract. I find it difficult to understand what the nature of the suggested implication could be, unless it were to be the effect that he agreed or consented that, if he lost his ticket, the company should be authorized to lay hands on him and remove him from their carriage.

I see no evidence whatever of any contract of that kind. If there were any breach of contract by him, it seems to me clear that they were not entitled to lay hands on him, but that their remedy would be by proceeding for the amount of the fare which he refused to pay. The case of *Wood v. Leadbitter*, *supra*, was relied upon by the counsel for the defendants; but I do not think that the principles enunciated in that case have any application to the present. The question there was as to the right to go upon land. The present case is one of a contract to carry with reasonable care, and has nothing to do with land or any easement over or license to go upon land. It does not appear to me that any question as to the revocability or otherwise of a license arises. For these reasons I agree that the appeal should be allowed.

The principal case is a good instance of how far the English Courts will go to protect the rights of individuals against infringement by corporations. To any one unfamiliar

with English railway management and English law, the statement of LORRE, L. J., that there is "no authority on such an important point as that raised in the present case," would

seem only less surprising than his doubt whether any regulation could be framed which would protect railway companies from the consequences of expelling from a train a passenger claiming to have lost his ticket during the journey, and refusing on that ground to comply with the by-law sought to be enforced in the principal case.

By the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, § 103, any person travelling in any carriage of a railway company without having previously paid the fare, or beyond the distance paid for, and with intent to avoid payment, "shall for every such offence forfeit to the company a sum not exceeding forty shillings," and by § 104, such person may be at once apprehended by the servants of the company. The penalty is recoverable in a summary proceeding before two justices of the peace, and can be enforced by a distress warrant: §§ 145, 146. See *Reg. v. Puget* (1881), L. R. 8 Q. B. D. 151. The operation of this law is strictly confined to cases of fraudulent intent (*Dearden v. Townsend* (1865), L. R. 1 Q. B. D. 10), but to its effective provisions it is probably due in part that no authority bearing directly on the principal case could be found. Another reason for this must lie in the English system of inspection of tickets before the train leaves any principal station, which system, though less thorough than the continental practice of inspection as the passenger leaves the waiting-room at any station, great or small, is apparently sufficient to warrant the belief that the plaintiff had his ticket when he got on the train, and had already showed it.

Before considering the American law on the expulsion of passengers for not having proper tickets, it may be as well to notice the decisions on the

statute above cited, and on by-laws like that in the principal case.

The use of a non-transferable ticket by one not the purchaser is fraudulent under this Act: *Langdon v. Howells* (1879), L. R. 4 Q. B. D. 337. But see *Closer v. L. & S. W. R.* (1867), L. R. 3 Q. B. D. 25, where a passenger had a valid ticket himself, but gave a ticket on which he had already travelled to a friend to use over again, this aid in the perpetration of a fraud was held not to justify the former's apprehension and detention under the statute, though it would necessitate nominal damages only in a suit for illegal arrest.

In *Dearden v. Townsend*, *supra*, it was held that as the company's by-laws must not be repugnant to the statute, a by-law similar to that in the principal case could only apply to attempts to defraud the company, and not to the case of a party travelling without having paid for and obtained a ticket, but with no attempt to defraud. In that case the passenger had gone beyond the station for which he had booked, and offered to pay the difference. For a parallel case on another by-law, see *Bentham v. Hoyle* (1878), L. R. 3 Q. B. D. 289.

Of course, as *Cockburn, C. J.*, said in *Saunders v. S. E. R.* (1880), L. R. 5 Q. B. D. 456, "the want of a ticket affords *prima facie* evidence of fraud, and entitles the company to put the traveller to the proof of the absence of a fraudulent intention. The refusal to produce a ticket leads in like manner to the inference that the party has none, and consequently to the inference of fraud."

In *Jennings v. G. N. R.* (1865), L. R. 1 Q. B. D. 7, it was held that, such a by-law being established for the benefit of the company, they must keep strictly within its provisions. Where they had allowed a passenger travel-

ling in one part of a train, to retain the tickets of the servants who accompanied his horses, the contract was with the master, and when the train was divided into sections, the master's carriage going in the first section, the servants ought not to have been prevented from following him in the other section.

In *Chilton v. L. & C. R.* (1847), 16 M. & W. 212, and *Brown v. G. E. R.* (1877), L. R. 2 Q. B. D., 406, similar by-laws were considered, but without decision as to their validity. In the latter case it was held that the by-law must be enforced, by a demand for the fare required by it, before the passenger could be arrested under the statute.

Such a by-law was held to apply to the case of season-ticket holders in *Woodard v. E. C. R.* (1861), 30 L. J. M. C. 196.

In *L. B. & S. C. R. v. Watson* (1878), L. R., 3 C. P. D. 429; s. c. on appeal 4 Id. 118 (a curious instance of English tenacity to principle, the sum in controversy being one penny), and *Saunders v. S. E. R.*, *supra*, such by-laws were held invalid, on account of the variable penalty imposed. As LUSH, J., said in the latter case, "A passenger who has travelled only the last ten miles in a train which has travelled a hundred miles, is fined ten times as much as another who started at the station *a quo*, and whose ticket was demanded at the end of ten miles, although the offence of refusing to show the ticket is precisely the same in the one case as in the other. A by-law which has this effect cannot be deemed a reasonable by-law."

In the United States and Canada, the laws making it an offence to attempt to travel without paying the proper fare are rarely enforced. Railroad companies usually rely on the simple remedy of putting the offender

summarily off the train. It is a well-settled general rule that, as between the railroad conductor and the passenger, the latter's ticket, or the stop-over check sometimes given in its place, is the only admissible evidence of his right to travel; that he must produce it whenever called upon by the conductor to do so, and also surrender it to him on request. It is equally well settled that a railroad company can expel from its trains all persons who are neither provided with such tickets as the rules of the company require, nor willing to pay the regular fare, plus such reasonable sum as the company may add when fares are paid on the cars. Hence, if the circumstances out of which the principal case arose had occurred on this side of the Atlantic, the plaintiff could not have recovered, unless, perhaps, if the conductor had already seen the ticket and cancelled it so that it could not be used over again, and remembered these facts. The present note will, therefore, consider only the limits of this unquestionable right to eject passengers, the manner in which it must be exercised, and the damages for unlawful expulsion.

Loss of ticket. It may be laid down as a rule, with one possible exception, to be noted below, that the loss of a ticket falls on the passenger. Thus in *Duke v. G. W. R.* (1856), 14 U. Can. Q. B. 377, the plaintiff had bought a ticket from St. Catharine's to Paris, but had lost it at the time of, or after starting, and so informed the conductor. He demanded the fare, and, on her refusal to pay, put her off the train at Grimsby. The judgment on the points reserved was for the defendants, BURNS, J., saying, "I do not see that the defendants should be held responsible for the loss of the ticket, which it was the wife's duty to have taken care of, sup-

posing that she in truth had one, as the evidence of her having paid for her seat. She chose to accept the contract of undertaking to produce that evidence when required; and if, by carelessness, negligence, or accident, she has lost that evidence of payment, she must be at the mercy of the defendants in regard to the fare being demanded by the conductor, and can have no legal right to say that the loss excuses from performance of the contract on her part, viz: to produce the ticket when required."

Hamilton v. N. Y. C. etc., R. (1872), 51 N. Y. 100, is to the same effect. The plaintiff had stopped over between Buffalo and Albany, and on resuming his journey failed to produce the coupon entitling him to passage to Albany. The evidence was in conflict as to whether he had left this coupon in the train, or whether the conductor had taken it up when the plaintiff got off; but the Court said that, even if he had merely lost it, "by the terms of the ticket it was good only upon its presentation, with the checks attached, to the conductor. If, therefore, the holder voluntarily or negligently deprived himself of that right, or because unable, in consequence of his own act or omission, of presenting (sic) the ticket in that form, he could not claim any privilege or right under it." Similarly, it was said in a steamboat case, "If the plaintiff lost his ticket, it would be his own loss, and not one which the defendants were to bear:" *Standish v. Narr. Stbt. Co.* (1873), 111 Mass. 512.

The same rule holds good in regard to season tickets, whether the commuter has merely forgotten to have his ticket with him, as in *Downs v. N. Y. N. H. & H. R. R.* (1869), 36 Conn. 287, or has lost it, as in *Cresson v. P. & R. R.* (1875), 11 Phila. (Pa.) 507. In the latter case, the plaintiff

had offered to indemnify the company against any possible loss through use of his ticket by another person; but it was held, that this did not affect the conductor's right to eject him.

The rule is also the same where the conductor has taken up a ticket and given a conductor's check in its place, at least where there has been a change of conductors and the check is demanded by the new one. In such a case it has been held, that as the check was as good as a ticket, "when [the passenger] had lost it, the loss was his, and he was situated as he would have been if the ticket had been returned to him and he had lost that, and as any one would be who bought a ticket to any opera or a lecture, or that would entitle the holder of it to any other privilege, and had lost it. Having lost it, he was called upon by the proper conductor to pay his fare. He had not any ticket or check to pay it with, and refused to pay it in money. Consequently, there was a refusal to pay it at all, and the conductor rightly expelled him from the train:" *Jerome v. Smith* (1876), 48 Vt. 230.

The case of a ticket for a berth in a sleeping-car has been held not to be within the rule. In *Pullman P. C. Co. v. Reed* (1874), 75 Ill. 125, the plaintiff had bought a ticket for his berth, but lost it before the train started, and it was not found till the next morning. He obtained a written statement from the ticket agent that he had bought the ticket, but the conductor refused to let him stay in the sleeping-car. The plaintiff was held entitled to recover the price paid for his ticket and a reasonable compensation for the trouble and inconvenience he suffered by being deprived of his berth, but a judgment on a verdict for \$3000 was reversed as excessive. This case clearly did not come

under the general rule as to lost tickets, both because the plaintiff proved to the conductor that he had had a ticket, but had lost it, and because a berth-ticket, being limited to a particular berth on a particular day, could not be used more than once, so that the company could have suffered no loss by allowing the plaintiff to retain his berth, even if the ticket had been found by an outsider.

The only possible exception to the rule is that already alluded to, where the conductor has already seen and punched the passenger's ticket, so that it could not be used again, and remembers this fact. There would seem to be no decision on this point, but in *Hibbard v. N. Y. & E. R.* (1857), 15 N. Y. 455, 461, it was said *obiter* that the conductor could not be presumed to remember such a fact. See *Robson v. N. Y. C., etc., R.* (1880), 21 Hun (N. Y.), 387, the conductor had seen and punched the plaintiff's tickets before the latter lost them. As, however, the case was decided on the ground that the expulsion, having been made without any demand for the fares, was illegal, the effect of the conductor's knowledge that the plaintiff had had his tickets was not passed upon.

It may be observed in this connection, in regard to conductor's checks, that in *Jerome v. Smith, supra*, the check was asked for by a new conductor, who could not have known that the plaintiff had received one.

Other cases of failure to produce a ticket. Where a passenger has carelessly taken a train which does not stop at his station, and refuses to pay his fare to the first stopping-place beyond, he may be summarily ejected: *A., T. & S. F. R. v. Gants*, February 11, 1888, Sup. Ct. of Kan. So where the company requires passengers travelling on freight trains to purchase

their tickets beforehand, and the passenger, finding no one in the ticket-office, gets on the train without looking to see if the ticket-agent is anywhere about the station: *I. & St. L. R. v. Kennedy* (1881), 77 Ind. 507. But if the ticket-office be shut and the passenger be guilty of no negligence, he is entitled to passage on the train on payment of his fare: *S. K. R. v. Hindsdale*, February 11, 1888, Sup. Ct. Kan.; *Brown v. K. Cy., H. S. & G. R.*, *Id.*

In *Shelton v. L., S. & M. S. Ry. Co.* (1876), 29 O. 214, which was cited by defendants' counsel in the principal case, but not referred to by the Court, the company had made a rule that a passenger who failed to produce a ticket or pay his fare should be put off the train; and this was held reasonable, even where the ticket had, before the passenger entered the train, been wrongfully taken from him by a servant of the company. The same doctrine was upheld in *Townsend v. N. N. C. etc., R.* (1879), 56 N. Y. 295, where a passenger whose ticket, entitling him to stop over, had been wrongfully taken up early in his journey, and he stopped over without any ticket whatever.

Expired tickets. It is familiar law that, if a railroad ticket of any kind be limited on its face to use within a certain time, it is not good after that date, and the passenger presenting it may be expelled from the train, if he refuse to pay his fare. And it is immaterial that the passenger be ready to start and go to the station before midnight of the day the ticket expires, if the last train of that day have actually left: *Arnold v. P. R. R.* (1886), 115 Pa. 135. But it is sufficient if the journey be begun before midnight of the day on which the ticket expires. It need not be completed before that time: *G. S. R. v. Bigelow* (1881), 68

Ga. 219; *Evans v. St. L., I., M. & S. R.* (1882), 11 Mo. App. 463; *Auerbach v. N. Y. C., &c., R.* (1882), 89 N. Y. 281; s. c. 21 AMERICAN LAW REGISTER, 790 and note. In such case the journey must be continuous. A passenger cannot stop over, and resume his journey after the expiration of his ticket: *Hill v. S. B. & N. Y. R.* (1875), 63 N. Y. 101.

If the limitation does not appear on the face of the ticket, and there is no proof that the passenger knew that such tickets were limited, and sold as such, he cannot be ejected from the train: *P. R. R. v. Spicker* (1884), 105 Pa. 142.

The words "good for this trip only" on a ticket have been held to relate to the journey, and not to time, so that the ticket can be used at any time within six years: *Pier v. Finch* (1859), 24 Barb. (N. Y.) 514.

If a ticket be invalid from lapse of time, or any other cause, except that it has been already used over the whole distance, or has been obtained by fraud, the passenger has a right to reclaim it, as evidence of value paid: *Vankirk v. P. R. R.* (1874), 76 Pa. 66.

Stopping over.—The authorities are clear that a railroad ticket is good only for a continuous passage between the points named thereon, unless the ticket itself or the rules of the company expressly provide otherwise, and that, if the company requires a stop-over check to be obtained, such rule must be complied with. In the absence of any stop-over privilege, stopping over is regarded as an abandonment of the right to demand passage for the rest of the distance: *Drew v. C. P. R.* (1876), 51 Cal. 425; *Stone v. C. & N. W. R.* (1877), 47 Ia. 82; *Hill v. S. B. & N. Y. R.* (1875), 63 N. Y. 101; *Deitrich v. P. R. R.* (1872), 71 Pa. 432. A ticket-agent at a way station has generally

no authority to vary the terms of the ticket in this respect: *McClure v. P. W. & B. R. R.* (1871), 34 Md. 522. But a train-agent or conductor can usually do so: *Turbell v. N. C. R.* (1881), 24 Hun (N. Y.), 51. Such permission is valid only for the particular stop for which it is given, and not for a second stop: *Denny v. N. Y. C., &c. R.* (1874), 5 Daly (N. Y.), 50. And where the company's rules provided that train-agents only should authorize stopping over, and the passenger, having stopped over, had told the train-agent of the second train that the conductor of the first train had authorized the stop, he was not allowed to show that such authority had really been given by the train-agent: *Petrie v. P. R. R.* (1880), 42 N. J. L. 449.

Where a ticket entitled the passenger to stop over at any point for which he had a coupon, and the conductor took up the coupon for passage from A. to B., and also that from B. to C., giving in exchange a check with no stop-over privilege, and the plaintiff stopped over at B., it was held that by the contract he was not bound to give notice of his stop, but could form the intention of stopping at any time before the train left B., and also that, the company having, for its own purposes, demanded of him the proper evidence of the contract, it was bound to put him in as good a position as if he had not parted with such evidence. Hence, his action was maintainable: *Pulmer v. C. C. & A. R.* (1872), 3 S. C. (N. S.) 580.

In *Maine* all tickets, except excursion, return and other special tickets at reduced rates, are good for six years from the date of issue, may be used on any train, and entitle the holder to "stop at any station along the line of the road at which such trains stop:" *R. S. Maine*, 1884,

p. 4771, Tit. iv. c. 51, s. 44. See *Dryden v. G. T. R.* (1872), 60 Me. 512; *Carpenter v. G. T. R.* (1881), 72 Id. 388.

Irregular tickets.—Tickets must be used in accordance with the conditions under which they are issued. Hence, where a ticket provides that the coupons attached shall be void if detached, and a passenger presents coupons without the ticket, he can be required to pay his fare or leave the train: *Marshall v. B. & A. R.* (1887), 145 Mass. 164; *Walker v. Dry Dock, etc. R.* (1867), 33 How. (N. Y.) 327; *Hamilton v. N. Y. C., etc. R.* (1872), 51 N. Y. 101; *H. & T. C. R. v. Ford*, 53 Tex. 364. So if a non-transferable ticket be used by one to whom it was not issued: *Cody v. C. P. R.* (1876), U. S. Circ. Ct. Dist. Nev., 4 Saw. 114. So if a ticket for passage from one station to another be attempted to be used in the reverse direction: *Keeley v. B. & M. R.* (1878), 67 Me. 163. It is also well settled that if a railroad has more than one line between two points, a passenger having a through ticket must go by the most direct route: *Bennett v. N. Y. C., etc. R.* (1877), 69 N. Y. 594.

Where a passenger's ticket purports to entitle him to travel on any regular train, and he has no notice that it is restricted to special trains, he is entitled to travel on it: *Maroney v. O. C. & N. R.* (1870), 106 Mass. 153. This is especially so where a servant of the company has told the passenger to get on the train, and he offers to pay the regular fare for passage on such trains: *L. S. & M. S. R. v. Rosenzweig* (1886), 113 Pa. 519. In that case it was argued that it was the duty of the purchaser of a ticket to know on what train it could be used, and that the company's rules and regulations were part of the contract, but the Court said, p. 538, "The legal presumption of knowledge

has never been extended to the by-laws and regulations of private corporations. No necessity has been shown for judicial enunciation that there is a legal presumption, or a fiction of law, that a person about to become a passenger, or who has become a passenger on a railway, knows the rules and regulations of the railway company."

In *P. R. R. v. Connell* (1884), 112 Ill. 295, the appellee's ticket had a coupon for passage over the appellant's line from Philadelphia to New York, but the Wabash company, who sold it, had previously had its authority to sell such tickets revoked, and in fact sold it with the expectation that the Baltimore and Ohio company would change the coupon for one by the Philadelphia and Reading line; but the appellee was not told this when he bought the ticket, nor had he any knowledge that it would not be received on the appellant's road. He attempted to use it on that road, and was ejected from the train. Judgment was reversed for error in the measure of damages, but the Court was of opinion that the ticket, having been sold by the Wabash company as agent for the appellant, was valid according to its terms. It is noticeable that the Court did not refer to the revocation of the agency. Of course, as a general rule, a principal who has made public the existence of an agency must also give publicity to its revocation; but all that a passenger usually knows of the relations between the various companies over whose lines his ticket takes him is that the ticket itself states that the company that sold it did so as agent for the others, no statement of the fact of this agency being made to him by the principals. Hence it is hard to see how the case comes within that rule of agency, or how the appellee's

position differed from what it would have been had the Wabash company never been at any time the appellant's agent.

Irregularities in purchase of tickets.—A ticket bought from any one not a general agent of the railroad company for the sale of its tickets, is bought at the passenger's risk in case such ticket turn out to be irregular. *H. & T. C. R. v. Ford* (1880), 53 Tex. 364. In that case the ticket was bought of one not an agent of the defendant, and had been issued by an agent of another company, which was authorized by defendant to issue its tickets in a prescribed form. This ticket was not in that form, and the plaintiff had to leave the train. It was held that he could not recover, both for the reason above given and because the words, "not good if detached," on the face of the ticket were notice that it could not be used in the way the plaintiff attempted to use it. But if the ticket had been properly issued, and is valid on its face, the fact that it was bought of a "ticket scalper" in a State where "scalping" is lawful, does not invalidate it for use even in a State where such unauthorized selling is forbidden: *Sleeper v. P. R. R.* (1882), 100 Pa. 259.

A passenger who seeks to travel on a ticket which he had paid for in counterfeit money, must pay his fare or leave the train, even if he did not know the money was counterfeit: *M. & C. R. v. Chastine* (1877), 54 Miss. 503. Similarly, a *bona fide* holder of a properly stamped and dated ticket, which has been obtained by fraud, can make no use of it, though he be without notice of the fraud: *Frank v. Ingalls* (1885), 41 O. St. 560.

Where a passenger bought his ticket on the train, and the conductor afterwards found that he had given too much change, and the former re-

fused to examine his change to see if the conductor was right, it was held that, as he had the means at hand to learn the truth, he could not recover for his expulsion: *McCarthy v. C. R. I. & P. R.* (1876), 41 Iowa, 432.

Acts and statements of ticket agents and others.—Such acts and statements do not usually affect the general American rule, given above, in regard to controversies between a conductor and a passenger. Hence where, as in *Frederick v. M. H. & O. R.* (1877), 37 Mich. 342, a passenger requests and pays for a ticket to his destination, but receives one for a shorter distance, and is ejected, he can sue for the breach of contract in giving him the wrong ticket, but not for the tort in expelling him. To the same effect, *C. B. & Q. R. v. Griffin* (1873), 68 Ill. 499; *Bradshaw v. S. B. R.* (1883), 135 Mass. 407. So where a passenger asks for a stop-over check, but is given a trip-check by mistake, and, on resuming his journey, is ejected: *Gorton v. M. L. S. & W. R.* (1882), 54 Wis. 234. And where the ticket-agent had told the plaintiff that he could take a certain train to his destination, and he got on the train accordingly, but the train was not one of those that stopped at his station, it was held that the conductor could lawfully eject him for refusing to pay his fare to the station beyond, although he had a right of action against the company for not carrying him to his station: *L. S. & M. S. R. v. Pierce* (1882), 47 Mich. 277.

There are some cases which are held not to come under the above rule, but the distinction is not very clear. Thus in *Murdock v. B. & O. R.* (1884), 137 Mass. 293, where the ticket agent had given the plaintiff a ticket already punched, and the latter had noticed this and asked about it, and the agent explained how it happened, and said

that the ticket was perfectly good, it was held that the plaintiff had a right to act on the agent's statements and explanations, and to refuse to leave the train. In *Hufford v. G. R. & I. R.* (1885), 53 Mich. 118, the plaintiff believed in good faith that the ticket which he had bought from the authorized agent of the company, was genuine, issued by the company, and such as the agent had a right to sell, but the conductor refused to receive it, stating that it bore the marks of having been used before. The plaintiff stated the facts to the conductor, but was ejected. It was at first said that, when the plaintiff found that the ticket was not good, he should have paid his fare; though, if it were apparently good, he could refuse to leave the car. When the case (February 3, 1887) came up again, after another trial, the Court went further, and said that the conductor was bound to accept the facts stated by the plaintiff as true, until the contrary was proven, without regard to any words, figures, or other marks on the ticket. In *P. W. & B. R. v. Rice* (1886), 64 Md. 63, the return-coupon of the plaintiff's ticket had been accidentally punched on the outward trip by the conductor, who then failed to correct his error on the ticket in the way the company's rules required. It was held that as the plaintiff was in no fault whatever, his expulsion on the return journey was wholly illegal.

Several cases have grown out of the provisions in certain return tickets, requiring that the holder be identified before his return by an agent at the place to which the ticket is issued, and sign the ticket before such agent, who shall then stamp the ticket in due form. If a passenger neglect to comply with this rule, he can be ejected, and has no remedy: *Moses v.*

E. T. V. & G. R. (1884), 73 Ga. 356. If he seek to comply, but the agent, being the proper agent of the company issuing the ticket, refuse to identify and stamp the ticket, the passenger can recover in tort if ejected: *Head v. G. P. R.*, S. Ct. Ga., Dec. 20, 1887. And where the ticket was signed before and stamped by an agent at another place than that designated, evidence that he was an authorized agent of the company is admissible to show a waiver of the condition: *Taylor v. S. & R. R.* (1888), 99 N. C. 185. But where the ticket was to a point beyond the defendant's line, and the agent of the second carrier was the proper party to apply to, and the plaintiff went to the office of such agent at the proper time, but found it shut, it was held that he could not proceed against the defendant, as the party in fault was not its agent: *Messer v. St. L., I., M. & S. R.* (1888), 127 U. S. 390.

As a general rule, all evidence of previous waivers of the company's rules by its servants is irrelevant: *Sherman v. C. & N. W. R.* (1874), 40 Iowa, 45; *Keely v. B. & M. R.* (1878), 67 Me. 163; *Marshall v. B. & A. R.* (1887), 145 Mass. 164; *Hill v. S. B. & M. Y. R.* (1875), 63 N. Y. 101. But where a commutation-ticket, on its face not valid unless signed by the holder, has been honored several times by the company's servants, although not signed, such waivers of the requirement bind the company, and the ticket can be used without a signature: *Kent v. B. & O. R.* 45 Ohio St. 294.

L. E. & W. R. v. Fir (1882), 88 Ind. 381, is a peculiar case. The conductor of a train, fearing arrest, hid himself on the engine and sent a brakeman to take up the tickets. He, being unused to the work, took up the wrong half of a return ticket, and

the plaintiff, who had not noticed the mistake, was only able to produce the outward coupon, on his return journey, and was ejected in consequence. He was allowed to recover for the expulsion.

How far the statements of a ticket agent are admissible as evidence in an action against a railroad company is another question. In *Melville v. B. & P. R.* (1882), 2 Mack. (D. C.) 63, it was held that a ticket issued on certain conditions, and signed by the passenger, was such a written contract as could not be altered by evidence of what a ticket-agent said. In *Rawitzky v. L. & N. R.* (La.), 3 South. R. 357, it was held that a passenger could not recognize one part of a clause in the conditions of a ticket which he had signed, and repudiate another part of the same. In *Burnham v. G. T. R.* (1873), 63 Me. 298, the real contract was held to be that made between the plaintiff and the ticket-agent, before the former saw the ticket, and that evidence of this verbal contract was admissible to do away with the effect of the words "good for this day only," which were printed on the ticket; and in *Robinson v. L. & N. R.* (1879), 2 Lea (Tenn.) 594, an ordinary ticket was said not to be such a written contract as to exclude parol representations, made at its sale. In *Vankirk v. P. R. R.* (1874), 76 Pa. 66, the ticket-agent's statements, made some days after the ticket was sold, were held evidence of the passenger's good faith, but their admissibility to establish a contract was not decided.

Though a servant of the railroad company may have been in fault, contributory negligence on the plaintiff's part will prevent a recovery. Thus, where a father, travelling with his lunatic son, got out for a few minutes at a station, leaving the son in the

car, and the son moved to another part of the train, and before the father could find him, his ticket was demanded by the conductor, who, not knowing that he was a lunatic, nor that his father had bought the tickets, put him off the train. The father was held to have no right of action: *Willets v. B. & R. R.* (1853), 14 Barb. (N. Y.) 585.

It is the duty of a railroad company to provide seats for its passengers, hence if a passenger can find no seat on a train, his refusal to produce his ticket does not make him a trespasser, and he cannot be ejected, except at a regular station: *Hardenbergh v. St. P., M. & M. R.*, S. Ct. Minn., June 18, 1888. But if he refuse to show his ticket without good reason, merely because he cannot get a perfectly satisfactory seat, he becomes a trespasser: *M. & C. R. v. Benson*, 85 Tenn. 627; *C., O. & S. R. v. Wells*, Id. 613.

Payment on trains.—It is well settled that a passenger paying his fare on a train may be required to pay a reasonable amount, usually ten cents, in excess of the rate at the ticket office, and that he may be ejected for refusal to do so. To warrant the enforcement of such a rule, there must have been an office at the station, where the passenger could buy his ticket: *Poole v. N. P. R.*, S. Ct. Oregon, April 30, 1888; and it must have been kept open for a reasonable time before the train was advertised to leave: *C. B. & Q. R. v. Parks* (1857), 18 Ill. 460; *St. L., A. & C. R. v. Dalby* (1857), 19 Id. 353; *C. & A. R. v. Flagg* (1867), 43 Id. 364; *I. C. R. v. Johnson* (1873), 67 Id. 312; *Paine v. C. R. I. & P. R.* (1877), 43 Iowa, 569; *Hall v. S. C. R.*, S. Ct. S. C., March 20, 1888. The case of *Carl v. C. R. I. & P. R.* (1884), 63 Iowa, 417, is not an authority to the contrary, as the

absence of the ticket agent was not the ground of the refusal to pay the extra fare. In New York, however, the contrary has been held: *Bordeaux v. Erie R.* (1876), 18 Hun (N. Y.) 579. After the regular time for a train to leave, even though it be delayed, it is no longer the company's duty to keep the ticket-office open: *St. L., A. & T. H. R. v. South* (1867), 43 Ill. 176; *C. B. & Q. R. v. Griffin* (1873), 68 Id. 499; *T. W. & W. R. v. Wright* (1879), 68 Ind. 586; *Swan v. M. & L. R.* (1882), 132 Mass. 116.

How long the right to pay fare lasts.—If a passenger who has produced no ticket, or an irregular one, though at first unable or unwilling to pay the fare demanded of him, offer to do so at any time before steps have been taken to eject him, the conductor ought to accept the fare: *C. B. & Q. R. v. Bryan* (1878), 90 Ill. 126; *O'Brien v. N. Y. C., etc. R.* (1880), 80 N. Y. 236. And the conductor ought not to act hastily in stopping the train. A passenger who is acting in good faith may reasonably suppose that his argument or explanation will have weight with the conductor; and if the first intimation to the contrary is the latter's pulling the bell-cord, it is even then not too late to tender the fare: *T. & P. R. v. Bond* (1884), 62 Tex. 442. So, if a passenger have not money enough to pay the full fare demanded, but says that he will try to borrow it, he must be allowed a reasonable time in which to do so: *Curl v. C., R. I. & P. R.* (1884), 63 Iowa, 417. But, as a general rule, after the conductor has stopped the train and begun to eject the passenger, it is too late for him to produce a valid ticket, if he has one: *State v. Campbell* (1867), 32 N. J. L. 309; *Hibbard v. N. Y. & E. R.* (1857), 15 N. Y. 455, 462; or the ticket accompanying a detached coupon which he has

presented: *L. N. & G. S. R. v. Harris* (1882), 9 Lea (Tenn.), 180, or to offer to pay his fare: *Bland v. S. P. R.* (1880), 55 Cal. 570; *Hoffbauer v. D. & N. W. R.* (1879), 52 Iowa, 342; *C. S. & C. R. v. Skillman* (1883), 39 O. 444; *Gould v. C. M. & St. P. R.*, U. S. C. Ct. Dist. Minn. (1883), 18 Fed. Rep. 155. And if the ejected passenger get on the train again, he may, though he offer to pay his fare, be again ejected: *O'Brien v. B. & W. R.* (1860), 15 Gray (Mass.), 20. The same rule holds if a passenger, having been put off at a regular station, offer to pay his fare: *Pease v. D., L. & W. R.* (1886), 101 N. Y. 367. The case of *S. C. R. v. Nix* (1882), 68 Ga. 572, seems to be contrary to the rule, but the decision was probably warranted by the conductor's hasty action.

It has been held that if the passenger be not a trespasser, and another passenger offer to pay the fare, even after the ejection has begun, the conductor ought to receive it: *Guy v. N. Y., O. & W. R.* (1883), 30 Hun, (N. Y.) 399, it was said, *obiter*, that if a passenger be ejected at a regular station, and there purchase a ticket or tender his fare for the whole journey, including the distance already traversed, he ought to be taken on the train. The dictum as to tendering the fare is probably overruled by *Pease v. D., L. & W. R.*, *supra*. In *Stone v. C. & N. W. R.* (1877), 47 Iowa, 82, the plaintiff had been ejected for want of a proper stop-over check, but bought a ticket for the rest of his journey and attempted to get on the train again, when the conductor prevented his doing so. In *Swan v. M. & L. R.* (1882), 132 Mass. 116, the conductor had told the ticket-agent not to sell a ticket to the plaintiff, who had just been ejected. In both these cases *O'Brien v. B. & W. R.*, *supra*, was

relied on, and the plaintiff not allowed to recover, and in the Iowa case, the Court added, "This ruling by no means excludes him from any other train." *O'Brien v. B. & W. R.* seems hardly an authority for these cases, as the ground of the ruling there was that the plaintiff, irrespective of his having been ejected, had no right to take passage on the train except at a regular station. The Court did indeed hold that the plaintiff's position would have been the same, even if he had been put off at a regular station, but that was not necessary to the decision. It is hard to understand how common carriers can refuse to enter into the usual contract of carriage with a man, merely because he has just been guilty of an actionable breach of contract with them, or even because he has trespassed on their property, so long as they do not prosecute him, or how, if they can refuse to contract with him, the mere inconvenience of his having to wait for the next train can suffice to purge him of the consequences of his trespass or breach of contract, as was held in *Stone v. C. & N. W. R.*, *supra*. In *O'Brien v. B. & W. R.*, *supra*, it was said that the plaintiff could not call on the railroad company "to perform the same contract which he had previously broken." In that case, the contract was rightly viewed as the same one, as a new one could not have been entered into except at a regular station, but what the plaintiff sought in *Stone v. C. & N. W. R.* and *Swan v. M. & L. R.*, was clearly a new contract.

Expulsion of passengers.—If a passenger claim to have lost his ticket, the conductor must give him a reasonable time in which to find it. What is a reasonable time is a question of fact for the jury: *I. & G. N. R. v. Wilkes*, 8 Ct. Texas, October 18, 1887. This

is especially true in the case of commuters: *Maples v. N. Y., N. H. & H. R.* (1871), 38 Conn. 557. As already noticed, a passenger cannot be put off a train until he has been asked to pay his fare: *Robson v. N. Y. C. & C. R.* (1880), 21 Hun (N. Y.), 387, and given a reasonable time in which to decide whether to do so or not, *T. & P. R. v. Bond* (1884), 62 Tex. 442, or in which to borrow money: *Curl v. C. R. I. & P. R.*, *supra*.

It has been held that if a passenger, with a ticket marked "good this day only," stops over, in reliance on the ticket-agent's assurance that he is entitled to do so, and the conductor has no reason to disbelieve the passenger's story, he must offer to refund the value of the unused part of the ticket, or to deduct the amount from the fare demanded, before he can eject the passenger: *Burnham v. G. T. R.* (1873), 63 Me. 298. This case grew out of facts occurring before the adoption of the Maine statute, cited *supra*, entitling passengers to stop over. Similarly a passenger cannot be ejected for refusing to pay the extra fare charged on trains, until what he has already paid be refunded: *Bland v. S. P. R.* (1880), 55 Cal. 570. But where the amount paid did not exceed the fare, at the rate charged on trains to the point where the passenger was ejected, the conductor has been held entitled to retain this sum: *Hoffbauer v. D. & N. W. R.* (1879), 52 Iowa, 342.

A passenger, who is not a trespasser, can in general only be put off at a regular station: *Maples v. N. Y., N. H. & H. R.* (1871), 38 Conn. 557; *Hardenbergh v. St. P. M. & M. R.*, 8 Ct. Minn. June 18, 1888; *Arnold v. P. R. R.* (1886), 115 Pa. 135. But a trespasser can be put off anywhere, provided it can be done without exposing him to serious danger: *McClure*

v. *P. W. & B. R.* (1871), 34 Md. 532; *Wyman v. N. P. R.* (1885), 34 Minn. 210; *C. S. & C. R. v. Skillman* (1883), 39 Ohio St. 444. In Illinois a statute requires that any expulsion shall take place at a regular station: See *T. H. A. &c. R. v. Vasatta* (1859), 21 Ill. 184. And even if a passenger offers to leave the train at once, and it is stopped for him, and he then refuses, this is no excuse for not taking him to the next station: *C. & N. W. R. v. Peacock* (1868), 48 Ill. 253. But if the passenger be lawfully ejected, and suffer no special damage, he can only recover nominal damages for being put off away from a regular station: *C. & A. R. v. Roberts* (1866), 40 Ill. 503. A similar statute in Indiana has been held permissive only, and not directory: *Jeff. R. v. Rogers* (1867), 28 Ind. 1; s. c. (1871), 38 Id. 116; *T. W. & W. R. v. Wright* (1879), 68 Id. 586.

The expulsion may be effected by force, provided no more force be used than is necessary to overcome resistance: *Gallena v. H. S. R. R.*, U. S. C. Ct., E. Dist. Ark. (1882), 13 Fed. Rep. 116; *Coleman v. N. Y., N. H. & H. R. R.* (1870), 106 Mass. 160; *G. W. R. Co. v. Miller* (1869), 19 Mich. 305; *State v. Ross* (1857), 26 N. J. L. 224; *Jardine v. Cornell*, S. Ct. N. J., June 20, 1888.

Though a passenger, who is entitled to travel, may lawfully refuse to leave the train, he must not forcibly resist an expulsion, but must rely upon his legal remedies: *Hall v. M. & C. R.*, U. S. C. Ct., W. Dist. Tenn. (1882), 15 Fed. Rep. 57, 61; *A. T. & S. Fe R. v. Gants*, S. Ct. Kan., February 11, 1888; *P. R. R. v. Connell* (1884), 112 Ill. 295; *Bradshaw v. S. B. R.* (1883), 135 Mass. 407; *Lillis v. St. L. K. Cy. & N. R.* (1877), 64 Mo. 464; *Townsend v. N. Y. C., etc. R.* (1874), 56 N. Y. 295. His resistance may

amount to contributory negligence: *Brown v. M. & C. R.*, U. S. C. Ct., W. Dist. Tenn. (1881), 7 Fed. Rep. 51, and the company will not be liable for any injuries he may receive, unless inflicted wilfully, wantonly, or maliciously: *A. T. & S. Fe R. v. Gants*, *supra*.

Though a railroad company is chargeable only with ordinary care towards trespassers, it cannot expose them to serious risks: *Rounds v. D. L. & W. R.* (1876), 64 N. Y. 129; *Arnold v. P. R. R.*, *supra*. Thus where a man, who was helplessly drunk, was ejected in the snow at a distance from a station, and was badly frozen in consequence, the company was held liable: *L. C. & L. R. v. Sullivan* (1884), 81 Ky. 624. And expulsion at midnight, at a flag station, far distant from any other station, or in a severe storm, remote from shelter, may be evidence of reckless, wanton, and oppressive action on the conductor's part: *Evans v. St. L., I. M. & S. R.* (1882), 11 Mo. App. 463; *Vankirk v. P. R. R.* (1874), 76 Pa. 66. But where a drunken trespasser was ejected and left near the track, and was run over half a mile away from the station where he was displaced, there was held to be no evidence that this was a proximate result of the expulsion: *Haley v. C. & N. W. R.* (1866), 21 Iowa, 15.

Damages.—If a passenger be unlawfully expelled from a train, he can recover for bodily injuries, for damage to his business from loss of time, and also for the indignity and injury to his feelings: *C. & N. W. R. v. Williams* (1870), 55 Ill. 185; *C. & N. W. R. v. Christelm* (1875), 79 Id. 584; *Hicks v. H. & S. J. R.* (1878), 68 Mo. 329; *Quigley v. C. P. R.* (1876), 11 Nev. 350; *Allen v. C. & P. S. F. Co.* (1884), 46 N. J. L. 198; *D. L. & W. R. v. Walsh* (1885), 47 Id. 548;

Townsend v. N. Y. C., etc. R. (1874), 56 N. Y. 295; *P. F. W. & C. R. v. Sasser* (1869), 19 Ohio St. 157.

Where the plaintiff was delayed, but not otherwise damaged, \$400 has not been held excessive: *T. W. & W. R. v. McDonough* (1876), 53 Ind. 289. In the same State \$500 has been allowed for one day's delay: *P. C. & St. L. R. v. Hennigh* (1872), 39 Ind. 509; and \$600, where a passenger was put off late at night, several miles from a station, and seven miles from his destination: *L. E. & W. R. v. Fix* (1882), 88 Id. 381.

Where a conductor wrongly supposed that a child, travelling on a half ticket, was of age to pay full fare, and insisted on ejecting him unless full fare were paid, and the mother left the train also, though told that her ticket was perfectly good, she was held entitled to recover damages on her own account as well as on that of the child: *Gibson v. E. T. V. & G. R.*, U. S. C. Ct., E. Dist. Tenn. (1887), 30 Fed. Rep. 904.

If a passenger has the money to pay his fare, his obstinate refusal to do so, and insisting on being ejected, will prevent a recovery on account of injury to his feelings: *Hall v. M. & C. R.*, *supra*; *Gibson v. E. T. V. & G. R.*, *supra*. And if the passenger resist, he cannot recover for bodily injuries received, unless wantonly

inflicted: *Lillis v. St. L. K. Cy. & N. R.*, *supra*. If the conductor be honestly mistaken, and no excessive force be used, only actual damages are, as a general rule, recoverable: *Grakax v. Pac. R.* (1877), 66 Mo. 536. But where the expulsion was from a horse-car, the passenger was allowed to recover for the injury to his feelings also, though not exemplary damages: *Hamilton v. Third Ave. R. Co.* (1873), 53 N. Y. 25.

If the act of the conductor be wanton, reckless, and oppressive, exemplary damages may be recovered: *Erans v. St. L. I. M. & S. R.* (1882), 11 Mo. App. 463; as where the plaintiff was put off at an unseasonable hour in the morning at a place where he suffered from exposure to the weather: *Hall v. S. C. R.*, S. Ct. S. C., March 20, 1888. In *L. S. & M. S. R. v. Rosenmossig* (1886), 113 Pa. 519, where the conductor showed utter disregard of the passenger's safety, and the latter was very severely injured, a verdict for \$48,750 was sustained.

In *Phila. Traction Co. v. Orban*, (1888), 119 Pa. 37; s. c. 27 AMERICAN LAW REGISTER, 338, the rule followed in the last-cited case is recognized as in accordance with the preponderance of authority, although its propriety is doubted.

CHAS. CHAUNCEY BINNEY.

Philadelphia.

RECENT AMERICAN DECISION.

Supreme Court of Alabama.

CHERRY ET AL. v. HERRING.

Where a deed was handed by the grantor to the grantee and both parties immediately went to the adjacent office of H. and the deed was there delivered to H. to hold until a sum of money should be paid, and H. then endorsed on the deed that it was an escrow, to be held until the payment, but the money was never paid and the deed not found; there was no delivery, and the deed did not become an executed conveyance.

APPEAL from the Circuit Court of Lee County.

The plaintiffs were non-suited in the Court below, in an action for the recovery of a tract of land, after the Court had refused to admit evidence that the common grantor, Thomas J. Stephens, had not delivered the deed to the defendant, but had deposited it as an escrow under the circumstances mentioned in the opinion (*infra*).

A. and R. B. Barnes and George P. Harrison, Jr., for appellants.

J. M. Chilton, for appellee.

STONE, C. J., February 1, 1888. We do not question the doctrine, so firmly established, that a deed cannot be delivered to the grantee, to be held by him as an escrow, and to become valid and binding as a conveyance, only on the happening of an event to transpire afterwards: *Williams v. Higgins*, (1881), 69 Ala. 517; 1 Dev. Deeds, § 314; 3 Wash. Real Prop. (5th ed.), 317; *Ins. Co. v. McMillan* (1856), 29 Ala. 147; *Simonton's Estate* (1835), 4 Watts (Pa.), 180. It is certainly true that a paper, on its face a deed, though formally executed in all other respects, is nevertheless inoperative as a deed, if there has been no delivery to the grantee. Delivery, however, need not be positively proved. It is often inferred from circumstances, not the least frequent of which in its occurrence is the possession of the deed by the grantee. Many other acts or facts justify the presumption of delivery, but we need not enumerate them: 3 Brick. Dig. 298, §§ 25-27; 1 Dev. Deeds, §§ 260 *et seq.*; 1 Brick. Dig. 53; 3 Wash. Real Prop. (5th ed.), 304. When the testimony is indeterminate, the inquiry of delivery *vel non* is one of intention, to be determined by the jury: *Alexander v. Alexander* (1882) 71 Ala. 295; *Murray v. Stair* (1823), 2 B. & C. 82; 1 Dev. Deeds, §§ 262-268. The fact that the grantee acquired or at some time had the possession of the deed, unexplained, raises the presumption that it was delivered to him by the grantor, and that it thereby became operative as a conveyance. We have shown above that this presumption cannot be overturned by proving that it was delivered to him as an escrow, to become a conveyance on the happening of some future event.

The reason assigned for this ruling is, that, when a grantor delivers to a grantee a deed formally executed in all other respects, each of the two parties has then performed every act which he proposes to do, or can do, in reference to the execution of the paper; and these acts, without more, raise the legal presumption that the conveyance is fully executed. Doing, or not doing, the outside thing upon which the effect of delivery, as a complete execution of the deed, is to depend, is not a proposition to do anything further with the deed. The naked offer is to prove a contemporaneous oral agreement that, unless some outside collateral, unwritten stipulation is complied with by the grantee, then this possession shall, *ipso facto*, be treated as no proof of delivery, and the instrument as no deed. To allow this, would be to permit the legal effect of a deed, complete to all outside appearances, to be varied, and in many instances defeated, by oral proof of an agreement not embraced in the writing.

In the case we have in hand, the testimony offered would have tended to show that the deed was handed to Herring, the purchaser, at a point near Hooper's office, and the two parties then went in company to Hooper and delivered the deed to him; that Hooper indorsed on the deed that it was delivered to him as an escrow, to be delivered to Herring when \$125 should be paid by Herring to or for Stephens; and that the money was never paid, and the deed was never afterwards in the hands of Herring. Hooper is dead and the deed was not produced. It has probably been destroyed or lost. This testimony, if received, would have tended to show the foregoing state of facts; that the delivery to Hooper was made by the consent of both parties, with the agreement and understanding which was expressed in his indorsement, and that the delivery of the deed by Stephens to Herring, if not made that the latter might inspect it, was at most made with the understanding that it should be carried to Hooper, and placed with him as an escrow.

We need not, and do not decide, what would be our ruling if Herring had kept the deed, and had never delivered it to Hooper. That question is not before us.

We do hold, however, that the testimony offered should

have been received ; and if it proves that the delivery and deposit with Hooper were made as offered to be shown, and with the agreement and understanding that Hooper should hold the deed as an escrow, then the handing of the deed by Stephens to Herring was not a delivery, and the deed did not thereby become an executed conveyance. Left, as the deed was, with Hooper, Herring could not have obtained possession of it until some other act was done, namely, a delivery of it by Hooper. This presents all the elements of an escrow, not in Herring's possession, but in Hooper's. In *Gilbert v. Ins. Co.* (1840), 23 Wend. (N. Y.) 43, it was ruled that "leaving a deed in the hands of the grantee, to be by him transmitted to a third person, to hold in escrow until the happening of a certain event, is not a delivery to the grantee, so as to vest title in him ;" s. c. and note, 35 Am. Dec. 543. The same doctrine is declared in *Fairbanks v. Metcalf* (1811), 8 Mass. 230, and in *Brown v. Reynolds* (1858), 5 Sneed (Tenn.), 639. This doctrine is asserted without disapprobation in Dev. Deeds, § 317 ; and in § 271, the same author says : "A delivery of a deed for inspection, or a delivery to the grantee or his agent, to be held while the grantee has under consideration the proposition whether he shall accept it or not, is not a valid delivery." And 3 Wash. Real Prop. (5th ed.) 317, says : "A deed can never be an escrow if delivered to the grantee himself, unless for the express purpose of being handed to another person." These principles we consider sound and conservative, and we adopt them. The rulings of the Circuit Court are in conflict with our views.

Reversed, nonsuit set aside, and cause remanded.

§ 1. *What may be delivered in Escrow.* Any kind of an instrument, having the essentials of a contract, may be delivered in escrow. The most familiar instance is that of an ordinary deed, but other instruments in escrow have been the subject of judicial decision, such as a sheriff's deed : *Jackson v. Catlin* (1807), 2 Johns. (N. Y.) 248 ; a promissory note : *Conch v. Meeker* (1817), 2 Conn. 302 ; *Foy v. Blackstone*

(1863), 31 Ill. 538 ; *Bellows v. Folsom* (1866), 4 Robt. (N. Y.) 43 ; *Perry v. Patterson* (1844), 5 Humph. (Tenn.) 133 ; a bond : *Madison, etc. Plank Road Co. v. Stevens* (1857), 10 Ind. 1 ; a stock subscription : *Wright v. Shelby R. R. Co.* (1855), 16 B. Mon. (Ky.) 4 ; *Case Wagon Co. v. Wolfenden* (1885), 63 Wis. 185 ; a composition deed : *Johnson v. Baker* (1821), 4 B. & Ald. 440 ; and any instrument, even though

not under seal: *Seymour v. Coving* (1864), 4 Abb. (N. Y.) App. 200; a mortgage: *Chipman v. Tucker* (1875), 38 Wis. 43; *Schmidt v. Desgan*, 69 Wis. 300.

§ 2. *Definition.* Etymologically, the word "escrow" means a "scroll." An old definition, and one much quoted, is as follows: "The delivery of a deed as an escrow is said to be, where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded: *first*, that the form of words used in the delivery of a deed in this manner, be apt and proper; *second*, that the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made:" Sheppard's Touchstone, 58.

This definition, as we shall elsewhere see, is not strictly correct, so far as it requires the delivery to be to a stranger: *Watkins v. Nash* (1875), L. R. 20 Eq. 262. A modern definition is that "an escrow is a deed delivered to a third person, upon a future condition to be performed by either party. It must be delivered to a stranger, and the conditions mentioned:" *Raymond v. Smith* (1825), 5 Conn. 555. As a description of an escrow, we have the following: "It is essential to an escrow that it be delivered to a third person to be by him delivered to the obligee or grantee, upon the happening of some event or the performance of some condition, from which time it becomes an absolute deed:" *James v. Vanderhuyden* (1829), 1 Paige, 387. Hence, where a deed was executed by H. and wife, and delivered as an escrow to M., who tendered it to the grantee, and, on

refusal by the grantee to accept it, M. returned it to H., this did not constitute H. an agent for his wife, to hold the deed as an escrow, and, after her death, to make a valid delivery to the grantee. *Executors of Schoenberger v. Hackman* (1860), 37 Pa. 87.

§ 3. *Must be a completed Instrument.* It will be observed that the instrument put in escrow must be a completed one; that is, nothing so far remains to be done, touching the perfecting of the instrument, except delivery to the grantee or obligee. If it is a deed, it must be signed by the grantor, the grantee named, and the land intended to be conveyed, described; it must be as complete in manual execution as if it were to be placed in the hands of the grantee and title pass at once. If anything in this respect remains to be done, it is not a valid escrow. Not only this, but, back of the deed, must be a contract between the parties to it, definitely assented to by both of them, and requisite in all its parts to cover all that is essential to secure a conveyance of the land. Unless there has been a meeting of the minds sufficient for a contract of conveyance, there cannot be a deed put in escrow; for if it is attempted, it will be the act of one only: *Flick v. Bunch* (1866), 30 Cal. 208.

§ 4. *To whom delivered.* It is elementary to say that a delivery of a deed or written contract is essential to its validity. This is true of an instrument delivered in escrow. But in all such instances of an escrow, the delivery must be to a person not a party to the instrument, a third person or stranger; as we have seen it stated, in the case of a deed, to some one else than the grantor or grantee. In fact, it may be broadly stated that there cannot be a delivery, in case of a deed, to the grantee, and

in case of a note, to the payee: *McCann v. Atherton* (1883), 106 Ill. 31; *Stevenson v. Cropwell* (1885), 114 Id. 19; *Stewart v. Anderson* (1877), 59 Ind. 375; *Deardorff v. Feresimon* (1865), 24 Id. 481; *Madison P. R. Co. v. Stevens*, *supra*; *Roche v. Roanoke Seminary* (1877), 56 Ind. 198; *Wright v. Shelby R. R. Co.*, *supra*; *Jackson dem. Russell v. Rowland* (1831), 6 Wend. (N. Y.) 666; *Gilbert v. North American Fire Ins. Co.*, *supra*; *Seymour v. Cowing*, *supra*; *Beers v. Beers* (1876), 22 Mich. 42; *Metcalf v. Van Brunt* (1862), 37 Barb. (N. Y.) 621; *Ordinary of N. J. v. Thatcher* (1879), 41 N. J. L. 403; *Foley v. Cowgill* (1838), 5 Blackf. (Ind.) 18; *State v. Chrisman* (1850), 2 Ind. 126; *Madison, etc. Plank Road Co. v. Stevens* (1855), 6 Id. 379; *Stephens v. Buffalo, etc. R. R. Co.* (1855), 20 Barb. (N. Y.) 332; *Miller v. Fletcher* (1876), 27 Grat. (Va.) 403. The last citation has an excellent discussion of old and modern cases and authorities. This is true, however, only of those instruments in which the conditional character of the instrument is not expressed in writing upon the face thereof; and only relates to those instruments where the condition rests in parol or an outside instrument: *McCann v. Atherton*, *supra*; *Wendlinger v. Smith* (1881), 75 Va. 309; *Hicks v. Goode* (1842), 12 Leigh (Va.), 479. An instrument in which the condition is not expressed therein, if delivered to the obligee, becomes operative at once, even though contrary to the intention of the parties hereto: *Foley v. Cowgill*, *supra*; *Bramon v. Bingham* (1863), 26 N. Y. 483; *Worrell v. Munn* (1851), 5 Id. 229: "A deed can only be delivered in escrow to a third person. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some subsequent event shall happen, such conditions must be inserted in the deed itself, or

else it must not be delivered to the grantee. Whether a deed has been delivered or not is a question of fact, upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely, or only upon the performance of some condition not expressed therein, cannot be determined by parol evidence. To allow a deed, absolute upon its face, to be avoided by such evidence, would be a dangerous violation of a cardinal rule of evidence. The deed in this case being absolute upon its face, and having been delivered to the grantee himself, took effect at once. It could not have been delivered to take effect upon the happening of a future contingency, for this would be inconsistent with the terms of the instrument itself. Without regard, therefore, to any understanding which may have existed between the parties at the time the deed was delivered, it must be held to be an absolute conveyance, operative from that time:" *Lawton v. Sager* (1851), 11 Barb. (N. Y.) 349.

§ 5. *Rule modified.* This is the rule laid down in the old cases (and in Touchstone, as we have seen): *Thoroughgood's Case*, Hil. 9 Jac. 1, 9 Co. R. 137; *Whyddon's Case*, Trin. 38 Eliz., Cro. Eliz. 520; *Holford v. Parker* (circa 1620), Hob. 246, and other respectable authorities: *Hicks v. Goode*, *supra*; and a plea setting up a conditional delivery is bad: *Hawksland v. Gatchell*, Easter T. 42 Eliz., Cro. Eliz. 835; *Williams v. Green*, Trin. T. 43 Eliz. Id. 884; *Foley v. Cowgill*, *supra*; *Pyn v. Campbell* (1856), 25 L. J. Q. B. 279. But this rule has been somewhat modified by a recent case in England. In the case referred to, a reconveyance was executed by one of two trustee mortgagees expressly as an escrow, conditioned on payment of

the mortgage debt, and was left by him with his co-trustee. The co-trustee afterwards also executed the re-conveyance expressly as an escrow "upon the faith of an undertaking that the business should be forthwith settled," and handed the re-conveyance to the solicitor of the mortgagor. This was held to be a good delivery as an escrow, and the Vice-Chancellor said, as to the execution, by the first co-trustee: "It is said that the deed thus executed could not be called an escrow, because it was not delivered to a stranger, and that is, no doubt, the way in which the rule is stated in some of the text-books—Sheppard's Touchstone, for instance; but when those authorities are examined, it will be found that it is not merely a technical question, as to whether or not the deed is delivered into the hands of A. B., to be held conditionally; but, when a delivery to a stranger is spoken of, what is meant is a delivery of a character negating its being a delivery to the grantee or to the party who is to have the benefit of the instrument. We cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving the character of an escrow. But if, upon the whole of the transaction, it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument." As to the execution by the second co-trustee, the Vice-Chancellor said he saw no difficulty in holding that, if it were a delivery to the solicitors acting for the mortgagor, "it was a delivery to him as an agent for all parties for the purpose of that delivery:" *Watkins v. Nash*,

supra. Here, it will be observed, was a delivery to the solicitor acting for the grantee alone, and it was held a good escrow. This is certainly a modification of the doctrine of the old authorities; and goes further than a less recent case, that a deed might be delivered as an escrow to a solicitor acting for all the parties to it: *Miller v. Brookes* (1860), 5 H. & N. 797.

§ 6. *Delivery to Agent*.—Since another may act for one in his stead, or a man may perform an act by an agent, a delivery to an agent authorized to receive the deed is a delivery in law to the grantee himself, and it cannot be made an escrow: *Duncan v. Pope* (1872), 47 Ga. 445; *Weir v. Batdorf*, Supreme Court, Neb. 1888; *Worrall v. Munn*, *supra*; *Stewart v. Anderson*, *supra*; *Bellerille, etc. Bank v. Bornman*, Supreme Court Ill 1886; *Madison, etc. Plank Road Co. v. Stevens*, *supra*; *Miller v. Fletcher*, *supra*. So a delivery to the grantor's agent will not put the instrument in escrow: *Weir v. Batdorf*, *supra*.

If the delivery is made to an officer of a corporation, with the intention of passing title, this is a delivery to the corporation itself, if such corporation is the grantee or obligee. But such an officer may act as the agent of both parties, and receive the deed in escrow; for there is no such personal identity between a corporation and its officers as will prevent a delivery to them as an escrow: *Southern Life Ins., etc. Co. v. Cole* (1852), 4 Fla. 359; *Bank of Healdsburg v. Bailhache* (1884), 65 Cal. 327. "It is said that delivery to an officer or servant of a corporation is delivery to the corporation. To this we assent, with the addition that such delivery is for the use and benefit of the corporation, and with intent to pass an absolute property or interest in the deed delivered; and the rule would be the same, if the delivery

should be made to a mere stranger. We do not think that there is such a personal identity between the corporation and its officers that a deed may not be placed in the hands of the latter as an escrow until the performance of some condition," etc.: *Southern Life Ins., etc. Co. v. Cole*, *supra*. So where one may act as the agent of both parties, he may hold the deed in escrow; but an absolute delivery to an officer of a corporation cannot be afterwards modified so as to put the instrument in escrow; the effect of the act can never be changed: *Cincinnati, etc. R. R. Co. v. Iliff* (1862), 13 Ohio St. 235. A deed may be delivered to arbitrators for their disposal, as they shall award the title: *Peck v. Goodwin* (1786), Kirby (Conn.), 64.

§ 7. *Transmission to Holder by Grantee.*—The question arises, can the grantee, or obligee, act as an agent to carry or transmit the deed to the person who is to hold it in escrow? This has been answered in the affirmative: *Gilbert v. North American, etc. Ins. Co.*, *supra*. "The deed, as well as the mortgage, was left in the hands of Nottingham (the grantee), to be forwarded to Babcock, the depositary. It was not put into the hands of the grantee to keep, but merely as a mode of transmission to Babcock, as was well said by the Judge on the trial. There was neither any formal delivery, nor any intent that the grantee should take it as the deed of the grantor. Nottingham received it, not as grantee, but as the agent of the grantor for a special purpose; and I see no good reason why he could not execute that trust as well as a stranger. He did execute it with fidelity, and the deed still remains with the depositary agreed on by the parties:" Id. Here it will be observed that the deed had reached the hands of the depositary, when the point was raised.

Suppose the grantee had retained the deed, denying the condition, and claiming an absolute delivery, what then? In such an event the delivery would be held to be absolute, and parol evidence not admitted to show the conditional delivery: *Bramon v. Bingham*, *supra*; *Jackson v. Sheldon* (1843), 22 Me. 569; *Brown v. Reynolds*, *supra*; *Simonton's Est.*, *supra*; *Murray v. Stair*, *supra*; *Den v. Partee*, 2 Dev. & Bat. (N. C.) 530; *Wright v. Shelby R. R.*, *supra*.

§ 8. *Words of Delivery.*—By some of the old authorities the word "escrow" must be used to make the delivery a good one in escrow; such as "I deliver this deed in escrow upon the condition," etc. But this rule has long since been exploded: *Nottebeck v. Wilks* (1857), 4 Abb. Pr. (N. Y.) 315; *Gilbert v. North American, etc. Ins. Co.*, *supra*. But the words used and the intention of the parties must show that it is a conditional delivery, such a condition as the law permits the parties to agree upon: *Jackson dem. Russell v. Rowland*, *supra*. If the grantor or obligor retain by agreement control over the instrument, it is not an escrow; for the depositary is only the agent of the grantor, and not of both, as the law requires: *Louhat v. Kipp* (1860), 9 Fla. 60; *Arnold v. Patrick* (1837), 6 Paige (N. Y.), 310; *Carrick v. French* (1846), 7 Humph. (Tenn.) 459; *Jackson v. Branch* (1851), 11 Id. 521; *Ordinary of N. J. v. Thatcher*, *supra*; *Evans v. Gibbs* (1846), 6 Humph. (Tenn.) 405; *Groves v. Tucker* (1848), 18 Miss. 9. "There was nothing agreed to be done by or on the part of the grantee as the condition upon the performance of which the deed was to become absolute, and to be delivered to him by the third person. It is the general rule that a deed delivered to a third person is viewed as an escrow

only in case it is agreed that the deed is to be delivered to the grantee, upon the performance by him of the stipulated condition: *Fitch v. Bunch*, *supra*. See *Clark v. Gifford* (1833), 10 Wend. (N. Y.) 310; *White v. Bailey* (1841), 14 Conn. 271; *Currie v. Donald* (1794), 2 Wash. (Va.) 58; *White v. Williams* (1836), 3 N. J. Eq. 376.

§ 9. *Whether an Escrow or Present Deed.*—It is often difficult to determine whether a deed is delivered in escrow or not. A modern authority, recognizing this difficulty, sums up what he considers the doctrine of the cases on this point as follows: "If the payment of money, or the performance of some other condition, is the circumstance upon which the future delivery is to depend, the instrument is an escrow; but where the future delivery does not depend upon the performance of any condition, but it is deposited with a third person merely to await the lapse of time or the happening of some contingency, it will be deemed the grantor's deed presently:" Devlin on Deeds, § 319, citing *Hathaway v. Payne* (1865), 34 N. Y. 92; *Foster v. Mansfield* (1841), 3 Met. (Mass.) 412; *Wheelwright v. Wheelwright* (1807), 2 Mass. 447; and saying in a note, "but see *Stone v. Duvall* (1875), 77 Ill. 475, where a deed of this kind was considered rather to be an escrow." Commenting further upon this subject, the same author says: "This distinction is material, because, if it be an escrow, no title passes to the grantee until the second delivery, while, if it be a present deed, the title, upon the happening of the contingency, or upon the lapse of the specified time, passes by relation from the time the instrument was placed in the hands of the depository or trustee. As the intent of the parties is the point to be ascertained, each case must be decided upon its

own peculiar circumstances, upon the language employed, the situation of the parties, the object to be attained, and such other facts as may throw light upon the intention of the parties:" § 320. In this he is clearly sustained by a quotation from *Hathaway v. Payne*, *supra*. See *O'Kelly v. O'Kelly* (1844), 8 Met. (Mass.) 436; *Murray v. Stair*, *supra*; *Shaw v. Hayward* (1851), 7 Cush. (Mass.) 170; *Cook v. Brown* (1857), 34 N. H. 460; *Hunter v. Hunter* (1853), 17 Barb. (N. Y.) 25; *Goodell v. Pierce* (1842), 2 Hill (N. Y.), 659; *Tooley v. Dibble* (1842), 2 Id. 641; *Ruggles v. Lawson* (1816), 13 Johns. (N. Y.) 285; *Price v. Pittsburgh, etc. R. R. Co.* (1864), 34 Ill. 13.

§ 10. *Grantor Retaining Control over Instrument.*—"An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is that there must be a parting with the possession, and of the power and control over the deed by the grantor, for the benefit of the grantee *at the time of delivery*:" *Prutsman v. Baker* (1872), 30 Wis. 644. For if he retains any control over it, it is not an escrow, notwithstanding it has been delivered to a third person with instructions to deliver it to the grantee or obligee upon the performance of some condition, or the happening of some event: *Campbell v. Thomas* (1877), 42 Wis. 437. In case of a true delivery in escrow the grantor has no control over the instrument delivered: *Welborn v. Weaver* (1855), 17 Ga. 267.

§ 11. *Gift.*—In case of a gift, the rule just referred to seems to be different. Thus, where a deed was placed as an escrow in a third person's hands, upon condition that it must first be signed and acknowledged by the grantor's wife, and not be delivered until the grantee executed a

mortgage, as the grantor called it, securing to him and his wife a life estate in the premises, and the custodian, without authority, placed the deed on record, after the grantor's death, it not having been signed by the wife nor any mortgage delivered, it was held that the heirs of the grantee could maintain an action to have it set aside. "It was his (the grantor's) privilege to judge for himself whether the terms upon which he was willing to deliver the deed to his property as a donation had been performed. The scrivener in whose custody the deed was left, was not invested with any discretion in regard to it. He had no authority to deliver it until the grantor was satisfied it should be. Being a voluntary conveyance without consideration, the grantor was at liberty at any time to withdraw the deed from the possession of the custodian, and the grantee could have no just cause to complain. The grantor was under no legal obligation to complete the donation:" *Hoig v. Adrian College* (1876), 83 Ill. 267.

§ 12. *Conditions Allowed.*—"The condition may consist in the payment of money as well as in the performance of any other act:" *Jackson v. Catlin, supra*. It seems useless to multiply citations upon this point. Of course no immoral or illegal condition could be insisted upon; and if the performance of such an act were the condition of the escrow, it would be an absolute delivery, perhaps, the condition being void.

§ 13. *Party in whom title is vested.*—While the deed is held in escrow, and before performance of the condition, or happening of the event, the title to the land remains in the grantor: *Harkreader v. Clayton* (1879), 56 Miss. 383; *Patrick v. McCormick* (1880), 10 Neb. 1; see *Bailey v. Crim* (1879), 9 Biss. 95.

§ 14. *Judgment against Grantor.*—The title remaining in the grantor, a judgment taken against him before the second delivery, is a lien upon the land: *Jackson dem. Russell v. Rowland, supra*. But if necessary to protect intervening rights of the grantee, it will be held that the deed took effect at the first delivery: *Shirley v. Ayres* (1846), 14 Ohio, 307; *Block v. Hoyt* (1877), 33 Ohio St., 212; *Price v. Pittsburgh, etc. R. R. Co., supra*.

§ 15. *When title passes.*—The title to the real estate only passes upon the happening of the event or the performance of the conditions upon which it was delivered: *Conck v. Meeker, supra*; *Daggett v. Daggett* (1887), 143 Mass. 516; *County of Calhoun v. American Emigrant Co.* (1876), 93 U. S. 124; *Jackson dem. Russell v. Rowland, supra*. No formal delivery by the agent holding the deed to the grantee is necessary: *Conck v. Meeker, supra*. "The title only passes on performance of the condition or the happening of the event, except in certain cases, where, by fiction of law, the writing is allowed to take effect from the first delivery:" *Prutman v. Baker, supra*.

§ 16. *Delivery enforced.*—A Court of Equity, on the performance of the condition or happening of the event, will compel a delivery of the deed by the depository of the grantee: *Stanton v. Miller* (1873), 65 Barb. (N. Y.) 58; *Schmidt v. Deegan, supra*. See *Shirley v. Ayres, supra*; *Knopf v. Hansen* (1887), 37 Minn. 215. This is true of the grantor, if he wrongfully obtains possession of the deed thereafter: *Regan v. Howe* (1876), 121 Mass. 424. The destruction of the deed by the grantor does not prevent the title vesting in the grantee: *Id.*

The Supreme Court of Kansas, on November 10, 1888, declared, in deciding the case of *Hughes v. Thistle-*

wood, which was an action to compel the delivery of a deed of the homestead, "that the wife, by intrusting the delivery of the deed to her husband after its due execution, authorized him to arrange the details of receiving payment and consummating the delivery; that the placing of the deed in escrow until the draft was converted into money was a step in the delivery of the deed, and the signature of the wife to the stipulation respecting the same was unnecessary to a conveyance of the property; and, further, that when the condition of deposit was accomplished it was the duty of S. to deliver the deed, and the attempted detention of the same would not prevent it from taking effect." The case was this: A tract of land, occupied by H. and his family as a homestead, was sold to T., and H. and his wife executed a deed, which H. presented to T. T. drew a draft on New York for the purchase-money, and the draft and deed were placed in the hands of S. as a depository, under a stipulation that he should deliver the deed when the draft was collected, and that H. should furnish an abstract showing good title to the property sold in him. The stipulation was signed by H. and T., but not by the wife of H. The money was collected on the draft in due course of mail, and within about eight days; and after some further delay in an attempt to rectify defects in the title disclosed by the abstract, T. demanded the deed, but in the mean time H. had notified S. not to deliver the same.

§ 17. *Relation back to first Delivery.*—There are instances in which it will be held that a deed in escrow takes effect, by relation, from the time of its first delivery, in order to prevent a failure of justice, or the intentions of the parties. "This relation back to the first delivery is permitted, how-

ever, only in cases of necessity and where no injustice will be done, to avoid injury to the operation of the deed from events happening between the first and second delivery; as, if the grantor, being a *feme sole*, should marry, or whether a *feme sole* or not, should die or be attainted after the first and before the second delivery, the deed will be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity. But subject only to this fiction of relation in cases like those above supposed, and others of the kind, which is only allowed to prevail in furtherance of justice and where no injury will arise to the rights of third persons, the instrument has no effect as a deed, and no title passes, until the second delivery; and it has accordingly been held, that if, in the mean time, the estate should be levied upon by a creditor of the grantor, he would hold by virtue of such levy, in preference to the grantee in the deed:" *Prutsman v. Baker, supra*. The better doctrine seems to be that the title passes at the time performance is made or the contingent event happens: 1 Devlin on Deeds, § 331. So far as the capacity of the grantor is concerned, it takes effect from the first delivery: 2 Wharton on Cont. § 679. Husband and wife executed a deed and placed it in escrow until the purchase-money was paid. Before that event, the wife died and the husband re-married. The claim of the second wife to dower, at his death, was denied, being taken away by relation of the deed back to the time of its delivery in escrow: *Vorheis v. Ketch* (1871), 8 Phila. (Pa.) 554. To a like point, see *Beekman v. Frost* (1820), 18 Johns. (N. Y.) 544; s. c. 1 Johns. Ch. 297; *Stanley v. Valentine* (1875), 79 Ill. 544.

§ 18. *Death of Grantor before second Delivery.*—If the grantor die while the deed is in escrow, before the performance of the condition or the happening of the event, the deed will take effect from the time of its first delivery, by relation, in order to prevent a failure of justice: *Jackson dem. Russell v. Rowland, supra*. In this case, such relation back was denied, where the object was to avoid an intervening judgment: *Latham v. Udell* (1878), 38 Mich. 238; *Welborn v. Weaver, supra*; see *Graham v. Graham* (1791), 1 Ves. Jr. 272; *Hill v. Hill*, 119 Ill. 242. The condition may be performed after death: *Lindley v. Groff* (1887), 37 Minn. 338. But, if the grantor retained any control over the deed, so as to prevent its being a strict escrow, no title will pass, for lack of delivery during the grantor's life: *Ball v. Foresman* (1881), 37 Ohio St. 132; *Cook v. Brown* (1857), 34 N. H. 460; *Prutsman v. Baker, supra*; *Citizens' Nat. Bank v. Dayton* (1886), 116 Ill. 257. So, no title will pass if the Act to be performed was not to be completed until after the death of the grantor: *Taft v. Taft* (1886), 59 Mich. 185; *Stone v. French*, 37 Kan. 145. But there is a line of cases which hold that, if the grantor execute the deed and deliver it to a third person to deliver it to the grantee, after his (the grantor's) death, it is a good deed, and the title passes only upon the second delivery, vesting, by relation, as of the time when the deed was left for delivery with such third person. But it will be observed that these are instances where the grantor has parted with his control over the deed: *Hathaway v. Payne, supra*; *Prutsman v. Baker, supra*; *Cook v. Brown, supra*. While a deed was in escrow, the grantor died, and his heirs gave a deed to the grantee, who paid the purchase-money to the administrator. It was held that he

held it as an individual for the heirs, and not as administrator: *Teneick v. Flagg* (1860), 29 N. J. L. 25.

§ 19. *Intention of parties that titles should pass.*—If it is the intention of the parties that the title, after the performance of the condition, should date from the first delivery, it will be so considered: *Price v. Pittsburgh, etc. R. R. Co., supra*.

§ 20. *Performance.*—The condition to be performed must be one that the grantee is to perform, and not the grantor, to make it an escrow; for if it was to be performed by the grantor, the deed would be within his control, and not an escrow: *White v. Williams, supra*. So the grantee is not entitled to the deed until he has complied with the terms of the contract; "a strict compliance with the terms of the agreement" on his part must be made: *Dyson v. Bradshaw* (1863), 23 Cal. 528; *Beem v. McKusick* (1858), 10 Id. 538; *Demesney v. Grovelin* (1870), 56 Ill. 93; *Skinner v. Baker* (1875), 79 Id. 496; *Eichlor v. Holroyd*, 15 Bradw. (Ill.) 657. The condition must be literally fulfilled: *Himmon v. Booth* (1839), 21 Wend. (N. Y.) 267; *Abbott v. Alsdorf* (1869), 19 Mich. 157. "Until the condition is performed, the deed is of no more force than it would have been if the grantor, after signing and sealing the instrument, had deposited it in his own desk:" *Smith v. South Royalton Bank* (1859), 32 Vt. 341. The grantee is bound to perform the condition, or respond in damages: *Hicks v. Goode, supra*.

§ 21. *Grantee obtaining possession of deed wrongfully.*—If the grantee obtain possession before performance, or the happening of the event, without the consent of the grantor, even with the consent of the depository, he gets no title to the instrument, nor to the land conveyed: *Harkreader v. Clayton* (1879), 56 Miss. 383; *Patrick v. Mc-*

Cornick, supra; *Bailey v. Crim, supra*; *Wheelwright v. Wheelwright, supra*. Such a deed will be declared void at the suit of the grantor: *Abbott v. Alsdorf, supra*.

The grantor is not estopped from setting up its invalidity by the fact that he had acted upon the belief that the condition had been complied with before delivery: *Robbins v. Magee* (1861), 76 Ind. 381.

§ 22. *Bona fide purchasers*.—There is some little conflict in the decisions, whether a *bona fide* purchaser from a grantee who has wrongfully obtained possession of the deed from the depository, will be protected or not. There is a strong line of authorities which hold that such a purchaser gets no title: *Cotton v. Gregory* (1880), 10 Neb. 125; S. C. 19 AMERICAN LAW REGISTER, 694; *White v. Core* (1882), 20 W. Va. 272; *Black v. Shreve* (1860), 13 N. J. Eq. 455. "Cortmel, the third person in whose hands it was placed as an escrow, did not, in fact, deliver it as a deed. And he had no power to do so, had he attempted to make such delivery, the event not having transpired upon which he was authorized to make it. No delivery having been made then, the deed was never executed to the railroad; for delivery is a material part of the execution of a written instrument; and, the deed not having been executed, no title passed, for title to lands is conveyed by executed deeds:" *Berry v. Anderson* (1864), 22 Ind. 36. "The deed not having been delivered, it was a nullity and void, or, more properly speaking, *never executed*, and must be tainted with the fraud of Rolfe, which goes to the very existence of the instrument, into whosoever hands they may come. It is not like the cases where the fraud is *collateral*, as where the instrument has become a perfect one, and it is appropriated fraudulently to a use

different from the one for which it was created:" *Smith v. Bank of South Royalton, supra*; *Evarts v. Agnew* (1855), 4 Wis. 343; *Crocker v. Bellanger* (1858), 6 Id. 645; *Peter v. Wright* (1855), 6 Ind. 183; *Fiasser v. Darie* (1878), 11 S. C. 56; *Illinois Cent., etc. R. R. Co. v. McCullough* (1871), 59 Ill. 166; *Cugger v. Lansing* (1870), 57 Barb. (N.Y.) 421; *People v. Bostwick* (1865), 35 N. Y. 450; *County of Culhoun v. American Emigrant Co., supra*; *Abbott v. Alsdorf, supra*; *State Bank v. Evans* (1835), 15 N. J. L. 155; *Roberts v. Mullenix* (1872), 10 Kan. 22; *Boyle v. Boyle* (1879), 6 Mo. App. 594; *Chicago, etc. Land Co. v. Peck* (1885), 112 Ill. 408, 447; *Chipman v. Tucker, supra*. But the grantor cannot insist upon recognizing the grantee's possession of the instrument as valid for some purposes, and disclaim it as nugatory for all others, especially when to do so would be an injury to an innocent party: *Cotton v. Gregory, supra*. See, generally, *Harkreader v. Clayton, supra*, *Ogden v. Ogden* (1854), 4 Ohio St. 182.

But where the grantor placed the grantee in possession, it was held, while fully acknowledging the rule as above stated, that the purchaser from the grantee obtained a good title in equity upon the ground that the grantor had been negligent, and upon the further ground, that where one of two innocent parties must suffer, "he must be the sufferer who put it in the power of the wrongdoer to cause the loss;" or "where one of two innocent parties must suffer, he through whose agency the loss occurred must sustain it:" *Quick v. Milligan* (1886), 108 Ind. 419; *Bailey v. Crim, supra*. The general rule has been denied: *Blight v. Schenck* (1849), 10 Pa. 285.

§ 23. *Proof of Condition*.—"The condition upon which a deed is delivered in escrow may be expressed in writing

or rest in parol. The rule that an instrument or contract made in writing *inter partes*, must be deemed to contain the entire engagement or understanding, has no application: *Stanton v. Miller* (1874), 58 N.Y. 192. Of course parol evidence is admissible to prove a condition resting in parol: *Madison, etc. Plank Road Co. v. Sterens, supra*. See *Foy v. Blackstone* (1863), 31 Ill. 538; *Brown v. Gilman* (1819), 4 Wheat. 255; *Koons v. Ferguson* (1865), 25 Ind. 388; *Freeland v. Charnley* (1881), 80 Ind. 132; *Campbell v. Thomas, supra*.

§ 24. *Statute of Frauds*.—"Where a promise is so far executed that a deed is delivered under it conditionally, it is taken out of the Statute of Frauds when the condition is fully performed, for, upon the performance of the condition, the deed becomes effective and the grantee is entitled to it:" *McCasland v. Aetna Life Ins. Co.* (1886), 108 Ind. 130. "But we have not discovered a single case in which it has been held, that one who has deposited a deed of land with a third person, with directions to deliver it to the grantee on the happening of a given event, but who has made no valid executory contract to convey the land, may not revoke the directions to the depository and recall the deed at any time before the conditions of the de-

posit have been complied with; provided those conditions are such that the title does not pass at once to the grantee upon delivery of the deed to the depository:" *Campbell v. Thomas, supra*, doubting *Thomas v. Sowards* (1870), 25 Wis. 631. So, it is held that a parol contract of sale of lands cannot be enforced simply from the fact that a deed for them was placed in escrow; that an escrow is not sufficient to take the sale out of the Statute of Frauds: *Freeland v. Charnley, supra*; disapproving 3 Wash. on Real Prop. 303, and *Cagger v. Lansing, supra*, overruled in *Cagger v. Lansing* (1871), 43 N. Y. 550. To same effect, Reed on Statute of Frauds, § 388; *Redding v. Wilkes* (1791), 3 Bro. Ch. 400; *Bissell v. Farmers' Bank* (1853), 5 McLean, 495; *Sanborn v. Sanborn* (1856), 7 Gray (Mass.), 142; *Underwood v. Campbell* (1843), 14 N. H. 393; *Weir v. Batdorf*, *Patterson v. Underwood* (1868), 29 Ind. 607. Instruments delivered to another on condition that other parties are to sign them before they are binding, are not delivered in escrow; they are incomplete instruments, and the doctrine of escrow is not strictly applicable to them: *Berry v. Anderson, supra*.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of Texas.

KASLING ET AL. v. MORRIS.

An offer to pay a reward for the detection of a criminal, is binding upon the private citizen making it, when acted upon.

It is not part of the official duty of a constable, who has not seen the commission of an offence, and has not any information as to the criminal, and has no warrant, to search a man (casually met on the road) upon mere suspicion.

APPEAL from the District Court of Cass County.

On the 10th day of March, 1886, at night, the storehouse

of appellee, R. A. Morris, in the town of Linden, Cass County, Texas, was broken into, and robbed of about \$175 in money. Early next morning, and immediately upon the discovery of the burglary, Morris publicly, and many times, offered a reward of \$1000 for the arrest and conviction of the thief or thieves. Plaintiff, E. S. Kasling, was the constable of the town and precinct where the burglary was committed, and plaintiff Simmons was a private citizen, who had, on some occasions, acted in an official capacity as deputy-sheriff. Among others, Morris told Kasling he would give \$1000 for the arrest and conviction of the party committing the burglary, and Kasling informed Simmons of the reward offered, and requested him to go with him in search of the thief. Rand, Taylor, and other parties also mounted horses, and went in different directions to try to find the burglar or burglars; the hope of the reward being the immediate inducement. Kasling and Simmons mounted horses, and rode some miles into the country in search of the burglar or burglars, and, on their return, saw a man on foot, near the road, whom they accosted, and finally informed that they must search him. They were ready with their pistols, and, fortunately, "got the drop on him," or, doubtless, one or both of them would have been shot; for, on forcing him to hold up his hands, they found two pistols on different portions of his person, to one of which he had motioned his hand, and also conclusive proof that he was a burglar, besides the whole of the stolen money, and a pistol that had been stolen on the night of the house burglary from another store in Linden which had also been broken into. They arrested him without warrant or affidavit, and took him at once to Linden, and lodged him in jail. Kasling then made the necessary affidavit, and procured a warrant, and, on the trial, the prisoner waived an examination, and was committed by the magistrate to answer the charge of the burglary of Morris' store and safe. At the ensuing term of the District Court, held in and for Cass County, Texas, the prisoner, James Sanders, was duly indicted for the burglary and theft in Morris' store, and for other felonies committed the same night, and was tried and convicted, E. S. Kasling being present, and testifying on behalf of the State.

Morris disobeyed the process of the State and left the county to avoid testifying against him. Sanders was duly convicted of said offence and consigned to the penitentiary. After the conviction of Sanders, appellants went to Morris and demanded the \$1000 reward. Morris at first evaded, and asked delay and time to see his attorney, and finally refused to pay; whereupon appellants brought this suit, which was submitted to the Court, without a jury, on the above facts, and was decided against appellants and in favor of Morris, both on the law and the facts; and appellants have taken this appeal.

E. S. Eberhardt and Todd & Rowell, for appellants.

WALKER, J. Oct. 26, 1888. The foregoing statement, adopted from the brief of the appellants, presents a fair and reasonably full statement of the case shown in the record. The statement of facts shows that Morris offered the reward as alleged. The offer was public, and repeatedly made, and in several instances was accompanied by special request to parties to act upon it, and to engage in the search for the guilty party. In one or more instances, he was asked if he was serious in making it, and replied that he was, and had the money to pay it. Unquestionably such an offer, when and after it has been acted upon, becomes binding upon the party making it: *Hayden v. Souger* (1877), 56 Ind. 42.

It is not disputed that Kasling and Simmons acted upon the offer, and arrested Sanders, who was subsequently convicted for the offence of burglary in breaking open and stealing from Morris' storehouse. Morris, the defendant, testified to his suspicions, which he told to others, that the burglary was another "Keating affair" (meaning that he thought it had been committed by persons residing in the neighborhood), and that he had named one as suspected, and that he thought three or more persons had been engaged in the crime, and substantially, that his motive for making the offer was to rid the neighborhood of dangerous criminals. However true his testimony may have been, the testimony of many witnesses supports the allegation in the petition, and that those motives in fact form no part of his public offer. That offer did not restrict the reward, so that it was to be given upon

the detection, arrest and conviction of the village blacksmith and his supposed associates, as the guilty parties. Nor would Kasling's knowledge of the motives inducing to the offer, or the direction of Morris' suspicions, of itself alter the terms of the public offer, or prevent Kasling from acting upon it. Of course, if, in the private conference between Morris and Kasling, the latter was informed that the offer was restricted, it would, to that extent, require notice by Kasling. It is noted, however, that Kasling distinctly denies the statement made by Morris as to the conversation between them before the arrest. What passed in that conversation is a question of veracity between the two interested parties.

Nor were the plaintiffs disqualified from earning and exacting the reward under the offer, by reason of the fact that Kasling was constable of the beat in which the arrest of Sanders was made. Kasling requested Simmons to arm himself and join in the search, assuring him of the offered reward. It appears that the arrest was made several miles from the county-seat, and was made without warrant. Kasling had not seen the offence committed, nor had he any information that Sanders was the guilty party, other than his own suspicions when they met on the road. The act was not required by his official duty. It is well recognized that an officer is not entitled to reward beyond his legal fees for the performance of an act which it is his official duty to perform. The employment and payment for extra-official work, though incident to his official duty, is not against public policy. Detective work is usually directed to the task of hunting up the perpetrator of some offence, where the ordinary machinery of the Courts needs such aid. This work is only incidental to the official duty of the constable or sheriff: Rev. Stat. Tex. Art. 4537; Code Crim. Proc. Tex. Arts. 44, 45; Add. Cont. § 18. The testimony shows that the offer was made, and its terms met, by a great preponderance in the testimony; so great that judgment should be reversed.

Reversed and remanded.

In his *Principles of Contract* (4th ed. 3-12), Mr. Pollock quotes with approbation section eight of the

Indian Contract Act: "Performance of the conditions of a proposal or the acceptance of any consideration for a

reciprocal promise which may be offered with a proposal, is an acceptance of the proposal;" and says, "this rule contains the true legal theory of offers of reward made by public advertisement for the procuring of information, the restoration of lost property, and the like."

In the discussion of this subject, the learned author says that a difficulty is raised by the suggestion, in certain cases, that the first offer or announcement is not a mere proposal, but constitutes a kind of anomalous floating contract with the unascertained person who shall fulfil the prescribed condition. He adds: "*A vinculum juris*, with one end loose, is, on principle, an inadmissible conception, to say nothing of the inconvenience which would come from treating the offer as an irrevocable promise:" Pollock on Contracts (4th ed.), 19.

Among the cases cited as countenancing this doctrine was *Williams v. Carwardine* (1833), 4 B. & Ad. 621. That case was stated as follows: A reward had been offered by the defendant for information which should lead to the discovery of a murderer. A statement which had that effect, was made by the plaintiff, but not to the defendant, nor with a view to obtaining the reward, nor, for aught that appeared, with any knowledge that a reward had been offered. The Court held that the plaintiff had a good cause of action. In commenting on this decision, the learned author says that it sets up a contract without any *animus contrahendi*, and that if it be now law (which he doubts), it goes to show that in these cases there may be an acceptance constituting a contract, without any communication of the proposer to the acceptor, or of the acceptance to the proposer. He also criticises the statement of PARKE, J., that there was a contract with any

person who performed the condition mentioned in the advertisement, as savoring of the notion that there is an inchoate or unascertained obligation from the publishing of the offer, and adds: "If such were indeed the *ratio decidendi*, we need not hesitate to say that at the present day it cannot be maintained:" Pollock on Contracts (4th ed.), 20.

These cases differ from those in which services, such as are usually paid for, are performed for the defendant's benefit, with his approbation, express or implied, and in which a promise to pay may be implied and recovery allowed, on the footing of a *quantum meruit*. In the other cases, where the obligation rests purely upon express contract, the question presented is whether performance of the terms of the offer, without knowledge of the proposal, will constitute a contract.

Mr. Pollock's dissent from the affirmative of this proposition is supported by the decisions of the American Courts.

In *Ball v. Newton* (1851), 7 Cush. (Mass.) 599, the action was brought on a written promise by a third person to pay certain fees in the case of an insolvent debtor, provided they were not otherwise paid. After the paper was signed, the plaintiff was chosen assignee in insolvency. The agreement was delivered to the insolvent, retained and not delivered to the plaintiff until the proceedings in insolvency were concluded. At the trial, he offered to prove that he had performed the duties of assignee; that his services were reasonably worth a certain sum; that he had received nothing therefor; and that no property had come to his hands out of which he could pay himself. The Judge ruled, that upon the facts in evidence and those offered to be

proved, the plaintiff could not maintain his action. On exceptions to this ruling, the Court held that the paper was not of itself a contract, that there were no sufficient parties to make a contract, there being no promisee; that if the paper had been shown to the plaintiff, and he had accepted it, and had become assignee and performed the services upon the strength of it, that might have formed a contract; but that it did not appear that the plaintiff ever saw or heard of the paper until after he had discharged the duties of assignee, nor did it appear that he accepted the paper, or performed any services upon the strength of it, or in reliance upon it, or did any thing whatever to create a good consideration and make a contract between him and the defendant. The principle on which this case was decided had in prior cases been recognized in the same Court: *Wentworth v. Day* (1841), 3 Met. (Mass.) 352; *Loring v. City of Boston* (1844), 7 Id. 409.

In *Fitch v. Snedaker* (1868), 38 N. Y. 248, the defendant offered a reward for information which should lead to the apprehension and conviction of the person guilty of a murder. Before the plaintiff had seen or heard of the offer, one F. was arrested, tried, and convicted of the murder. The plaintiffs brought an action to recover the reward. On the trial they proved the publication of the notice, and then offered to prove that before the notice was known to them they gave information which led to the arrest of F. This evidence was excluded. This ruling was sustained by the Court of Appeals. *Woodruff, J.*, in delivering the opinion, said, "The question in this case is simple. A murderer having been arrested and imprisoned in consequence of information given by

the plaintiffs, before they are aware that a reward is offered for such apprehension, are they entitled to claim the reward in case conviction follows? * * * I perceive, however, no reason for applying to an offer of reward for the apprehension of a criminal, any other rules than are applicable to any other offer by one, accepted or acted upon by another, and so relied upon as constituting a contract. * * * To the existence of a contract there must be mutual assent, or, in another form, offer and consent to the offer. The notice inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard?" This case was cited and followed in *Howland v. Lounds* (1873), 51 N. Y. 604, where it was held that a party returning stolen property without knowledge of the offered reward could not recover.

City Bank v. Bangs (1833), 2 Ewd. Ch. (N. Y.), 95, was an interpleader between claimants for a reward for the recovery of stolen property. The Vice-Chancellor adopted as a rule of decision, that to entitle a person to a reward, the acts done by way of performance must be done with a view to the acceptance and performance of the contract tendered by the offer, in the expectation of earning the reward if the effort is crowned with success. A similar ruling was approved in *Lee v. Trustees, etc.* (1838), 7 Dana (Ky.), 28; and *Stamper v. Temple* (1845), 6 Humph. (Tenn.), 113.

In *Mayor, etc. of Hoboken v. Bailey* (1873), 36 N. J. L. 490, the county of H. had offered a bounty for volunteers. The city of Hoboken, which was in the county, by resolution of the common council, offered an additional bounty to volunteers who should

be credited to the city. The plaintiff was recruited by an agent of the county, paid the county bounty and credited to a ward in the city. He sued the city for the additional bounty. It did not appear that the plaintiff knew that any bounty was offered by the city. Error was assigned to the judge's charge that the jury should find a verdict for the plaintiff, on the ground that there was no evidence of a contract by the city to pay the plaintiff the bounty, or of any consideration to support a recovery. The Court in the opinion, reversing the judgment for error in the charge, said: "The city was under no obligation to answer the demand which had been made under the conscription law upon its citizens who were liable to draft. The Act of the Legislature under the authority of which the resolution was passed, gave the corporate authorities power to use the funds of the city to supply volunteers, but did not enjoin it upon them as a duty. The benefit accruing from the relief of citizens from a draft was to individuals. Whatever aid was extended by the city towards the accomplishment of that end was purely gratuitous. * * * * The consideration for an undertaking of this kind is not the rendition of services beneficial to the promisor. In this respect the resolution of the common council is analogous to the offer of a reward for the apprehension of the perpetrator of a crime. * * * * Upon what principle does the right of recovery in such case rest? It cannot be maintained on the proposal of a reward, or bounty, for no contract will be concluded by a mere offer; nor will it result from the fact of performance, for an interest in the subject to which the offer relates is not essential to the validity of the contract, where the service is performed. The

foundation of the right of action is the contract concluded between the parties, by the proposition by the one side, and its acceptance by the other, supported by the consideration which results from the performance of the stipulated service, on the faith of the promise contained in the offer. * * * * The right of action in such cases being founded in contract, for which no precedent consideration was paid, and in which no promisee is named, it would follow as a necessary result, that in order to complete the contract and give it mutuality, an assent in some way to the terms of the offer must be given. It is also equally clear that, where the service in itself is not beneficial to the promisor, it can be made available as the consideration of a contract, only where the person performing it was induced to do so by a request, express or implied, on the part of the promisor. * * * * There cannot be any assent or agreement to an offer of which the party has no knowledge. The proposal of a reward which was not within the knowledge of the person who happens, or from other considerations is induced, to perform the act designated as the condition on which the reward is payable, cannot by any rule of law or process of reasoning, be construed to be a precedent request, or to have operated as an inducement to do an act which is done in entire ignorance of the offer." The Court referred to *Williams v. Carwardine*, *infra*, and observed that as the case *in banc* was reported, it did not appear that the plaintiff acted without knowledge of the offer of a reward, and that in the report of the trial at *nisi prius*, it was manifest from the circumstances in evidence and the argument of counsel that the plaintiff's knowledge of the handbill was not disputed.

Referring to the case of *Williams v.*

Curcardine (1833), reported in 5 C. & P. 566, it is apparent from what took place at the trial, that the only controversy was, whether the plaintiff, acting from motives of revenge and not for the sake of the reward, came within the conditions of the handbill.

The same reporters add a note of the case *in banc*, in which Curwood, in response to the question by Lord Chief Justice DUNMAN, if any doubt had been suggested, whether the plaintiff knew of the handbill at the time of making the disclosure, said that she must have known it, as it was placarded all over Hereford, the place where she lived. Mr. Justice LITTLEDALE added, that, if the person knew of the handbill and did the thing, that was quite enough. These expressions indicate that the learned justices inferred knowledge on the part of the plaintiff from the public nature of the notice, and the absence of testimony to the contrary. It is not to be supposed that the Court would have disregarded the principle laid down in the leading case of *Lamplugh v. Braithwaite* (1603-25), Hob. 105, without some reference to that case. That was an action to recover a reward for procuring the King's pardon. The defence was the absence of sufficient consideration. It was agreed that a mere voluntary courtesy would not have a consideration to uphold an *assumpsit*, "but," said the Court, "if that courtesy were moved by a suit or request of the party that gives the *assumpsit*, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference." And it appearing that the defendant had personally requested the plaintiff's endeavor, and that he had made his endeavor according to the request, the plaintiff had judgment.

Reasoning similar to that in *Mayor, etc. of Hoboken v. Bailey, supra*, has been applied by other Courts in the disposition of claims by volunteers to bounties offered by public authorities: *State v. Brown* (1866), 20 Wis. 287; *Frey v. Fon du Lac* (1869), 24 Id. 204; *Larimer v. McLean County* (1868), 47 Ill. 36; *Morgan v. Chester County* (1867), 56 Pa. 466; *Brecknock School District v. Frankhauser* (1868), 58 Id. 380.

Brecknock School Dist. v. Frankhauser was an action brought to recover a bounty, under an Act of the Pennsylvania Legislature. The evidence at the trial showed the plaintiff's enlistment, and his being credited to the quota of Brecknock Township. The Court, in reversing judgment for the plaintiff below, said: "The veteran must show that he enlisted under the offer, before a contract can be implied to pay him a bounty. * * * His credit to the township was an act of the government merely, in the distribution of the demands for military service, and created of itself no duty, perfect or imperfect, to pay him a bounty without an accepted offer."

In a few cases, knowledge of the proposal before performance of its terms has been held immaterial. Some of these decisions were founded upon unsatisfactory interpretations of *Williams v. Curcardine, supra*, and without further reasoning; *Russell v. Stewart* (1872), 44 Vt. 170, and *Burke v. Wells, Fargo & Co.* (1875), 50 Cal. 218. Others allowed recovery on grounds of public policy, independent of contract relations: *Dawkins v. Sappington* (1866), 26 Ind. 199; *Auditor, etc. v. Ballard* (1873), 9 Bush (Ky.), 572.

The weight of authority and the force of reasoning in the American Courts strongly support Mr. Pollock's protest against the inference of a con-

tract where, because of the general character of the offer, there can be no implied previous request to any definite person, and where want of knowledge by the plaintiff of the proposal excludes the idea of assent, the *vinculum juris* which alone can bind the minds of the contracting parties.

In most of the cases cited, the action was upon an offer where the proposer had no pecuniary interest in the performance of the condition, but in *Hewland v. Lounds, supra*, the suit was on an offer of a reward by public advertisement by the owner for the return of

stolen property. The same principle was properly applied. *Hayden v. Souger, supra*, was a case where a wounded man offered a reward and was compelled to pay it to the parties who heard of it and fulfilled its terms. No recovery can be had upon the ground of a contract where there is no assent, nor independent of contract, where the defendant could not reject the services without repudiating his property.

SHERBROOK DEFEND.

Newark, N. J.

ABSTRACTS OF RECENT DECISIONS.

ACCIDENT INSURANCE.

No recovery can be had on policy which excepts liability if the death "may have been caused by intentional injuries inflicted by the insured or any other person," where the insured was shot and killed by a third person, though without provocation and while peaceably and lawfully engaged in his ordinary business: *Fischer v. Travelers' Ins. Co.*, S. Ct. Cal., Oct. 28, 1888.

ADMIRALTY.

Claim barred at law by the statute of limitations is barred in admiralty, by analogy, on the ground of laches: *Southard v. Brady*, U. S. C. Ct. S. D. N. Y., Oct. 15, 1888.

English law governs a proceeding *in rem* by a seaman for personal injuries received on board an English vessel while within English waters, though the seaman is a naturalized American citizen: *Roberts v. Egyptian Monarch*, U. S. D. Ct. D. N. J., Nov. 17, 1888.

AGENCY.

Ship's husband cannot, without express authority from owners, render them liable for money borrowed on the vessel's account, nor can the owners be held to have impliedly ratified such unauthorized borrowing from the mere fact that they received benefits therefrom in repairs made upon the vessel: *Arcey v. Hall*, S. Jud. Ct. Me., Dec. 8, 1888.

ARBITRATION.

Boundary line was settled by award of arbitrators, but one of the parties subsequently entered upon the disputed land and erected a fence

several rods beyond the line designated in the award ; this action did not constitute such a breach of the agreement, "to abide by and perform the award," as would sustain an action for the penalty stipulated in such agreement : *Weeks v. Trask*, S. Jud. Ct. Me., Dec. 27, 1888.

Fraud in the decision of an arbiter may be set up in a suit on the contract in avoidance of his decision, even though it does not appear that the party who would derive benefit from the fraud has colluded : *Chism v. Schipper*, S. Ct. N. J., Dec. 10, 1888.

ATTORNEY-AT-LAW.

Admission to practice is a judicial, not a ministerial act, and the Legislature has no power to control a Court in its exercise : *In re Splane*, S. Ct. Pa., Jan. 21, 1889.

Lien of attorney upon the funds, documents and securities of his client, which come into his hands professionally, for the general balance due him from his client, is merely a right to hold and retain until he is satisfied, and is not such a lien as can be enforced by a judicial proceeding : *Woods v. Dickinson*, S. Ct. D. C., Jan. 1889.

Lien of solicitor, who, at the request of his client, for whom he has filed a bill to redeem a mortgage owned by her and pledged for a debt, pays the amount fixed by the decree as necessary to redeem, gets possession of the mortgage and takes an assignment as security for the amount advanced by him and his costs, is superior to the rights of a third party having a prior assignment of the mortgage : *Osborne v. Dunham*, Ct. Ch. N. J., Dec. 26, 1888.

BANKS AND BANKING.

Directors of national bank are not liable for acts done in violation of the banking laws by an officer, whom they have every reason to believe is competent and honest, without their participation, knowledge or connivance : *Clews v. Bardon*, U. S. C. Ct. E. D. Wis., Nov. 22, 1888.

Forged mortgage was given as security for a loan, which was paid by a check drawn to order of the supposed borrower ; the person procuring the loan also forged the indorsement of the payee of the check, added his own indorsement and collected the money from the bank ; the bank was not protected by payment, though the last indorsement was genuine : *Atlanta Nat. Bank v. Burke*, S. Ct. Ga., Oct. 8, 1888.

Pledgee of stock of national bank, who does not appear by the books of the bank, or otherwise, to be the owner, is not liable as a shareholder to an assessment upon the shares, on the insolvency of the bank : *Welles v. Larrabee*, U. S. C. Ct. N. D. Iowa, Dec. 11, 1888.

Purchase of bank stock, levied upon and sold under execution against the former owner, who had transferred the shares on the books as collateral security for his debt due and unpaid at the date of the levy, and greater than the market value of the stock at the time, does not render the purchaser liable for the unpaid subscription to the stock, as the sale passes no title: *Simmons v. Hill*, S. Ct. Mo., Dec. 20, 1888.

BILLS AND NOTES.

Condition of giving a promissory note, made in contemplation of a proposed transaction, was that it was to be valid only when the transaction had been approved by a certain attorney; upon the attorney's advising the maker to have nothing to do with the transaction, the note became void: *Ware v. Allen*, S. Ct. U. S., Dec. 17, 1888.

Holder for value is constituted where one takes a promissory note in part satisfaction of an existing debt and in consideration thereof releases valuable liens: *Fitzgerald v. Barker*, S. Ct. Mo., Dec. 20, 1888.

CHATTEL MORTGAGE.

Good-will of a newspaper company, included in a mortgage of its "machinery, type, presses, cases, furniture, paper, forms and tools," cannot be sold under foreclosure proceedings, after all the tangible property covered by the mortgage has been alienated, worn out or destroyed, and the company has become consolidated with another newspaper corporation: *Metropolitan Nat. Bk. v. St. Louis Dispatch Co.*, U. S. C. Ct. E. D. Mo., Nov. 21, 1888.

Lease of piano, valued at a fixed sum, with an agreement for monthly payments thereon, provided that, if the lessee should default in the stipulated payments, the piano should be returned, or interest paid on the deferred instalments, at the lessor's option, that the instrument should not be removed from the premises, and that no agreement of sale should be implied and no sale be valid without the lessor's receipt; the transaction was a conditional sale and not a chattel mortgage: *Gerow v. Castello*, S. Ct. Col., Oct. 26, 1888.

CITIZENSHIP.

Birth in the United States from Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the government of China or other foreign power, makes the child a citizen of the United States, and he is not subject to the provisions of the Chinese restriction and exclusion acts of 1882, 1884 and 1886: *In re Wy Shing*; *In re Wong Gau*, U. S. C. Ct. N. D. Cal., Nov. 8, 1888; *In re Yung Sing Hoo*, U. S. C. Ct. D. Or., Oct. 10, 1888.

CONSTITUTIONAL LAW.

Chinese Exclusion Act of Oct. 1, 1888, is not unconstitutional, either as a law divesting rights vested under the several treaties between the United States and China and the prior restriction acts, or

as an *ex post facto* law: *In re Chae Chan Ping*, U. S. C. Ct. N. D. Cal., Oct. 15, 1888.

Fourteenth Amendment to the Constitution of the United States, providing that no State shall "deprive any person of life, liberty or property without due process of law," is violated by a municipal ordinance, authorized by State statute, which appropriates land for a public street and requires the remaining land of the owners to be assessed for the entire costs and expenses, without requiring compensation to be first made to the owners for the land so taken: *Scott v. City of Toledo*, U. S. C. Ct. N. D. Ohio, Sept. 28, 1888.

Imposition of punitive damages upon railway companies, by State statute, for the failure to pay within thirty days for stock killed by reason of the company's neglect to fence its track, is not a denial of the equal protection of the law, nor a deprivation of property without due process of law, within the meaning of the Fourteenth Amendment: *Minneapolis & St. L. Ry. Co. v. Beckwith*, S. Ct. U. S., Jan. 7, 1889.

CONTEMPT.

Commitment without notice, and without giving the offender an opportunity to be heard, may be made, where a contempt has been committed in the presence of the Court: *In re Terry*, S. Ct. U. S., Nov. 12, 1888.

CONTRACT.

Entire contract, such that the contractor cannot recover upon a *quantum meruit* for a part of the work done, the balance being defective, does not result from an agreement to build a cement sidewalk, "to be not less than 10 feet wide and — feet long:" *Katz v. Bedford*, S. Ct. Cal., Nov. 1, 1888.

COPYRIGHT.

Official reporter, under authority of a State statute, reported and prepared for publication the decisions of the Supreme Court of the State, receiving from the State a stated compensation and securing a copyright for the State upon each volume, as published; such copyright did not protect the *syllabi*, statements of cases and opinions, which were the work of the judges: *Banks v. Manchester*, S. Ct. U. S., Nov. 19, 1888.

State is not a citizen within the meaning of the copyright law: *Id.*

CORPORATIONS.

Payment of interest on bonds of a corporation cannot be refused on the ground that forgeries of the bonds, so executed as not to be distinguishable from the genuine, are in circulation, and that all the bondholders, except the claimant, have accepted new bonds so prepared as to prevent the possibility of fraud or loss, but that the claimant has not accepted the same: *Wood v. Consolidated Electric Light Co.*, U. S. C. Ct. S. D. N. Y., Nov. 8, 1888.

CRIMINAL LAW.

Conspiracy is a crime triable by jury at common law and cannot be tried summarily by a police court, even though a jury trial can be had by appealing; such procedure is forbidden in the District of Columbia by Art. III. Const. U. S.: *Callan v. Wilson*, S. Ct. U. S., May 14, 1888.

DAMAGES.

Spreading of embankment, caused by the original filling sinking in marshy ground, and material being deposited on top to preserve the grade, is a damage not contemplated in the original grant of a right of way, and an action may be brought for any injury done to the adjoining land. *Roushlang v. C. & Alt. R. R. Co.*, S. Ct. Ind., May 29, 1888.

DEED.

Irrigating ditch and water-right were necessary to the use and enjoyment of premises conveyed by a deed, granting the land with its "appurtenances;" the grantor's interest in such ditch and water-right passed by the deed: *Tucker v. Jones*, S. Ct. Mont., Sept. 15, 1888.

EXEMPTION.

Homestead right will be allotted entirely out of the husband's interest, as against his debt, although the homestead property is owned jointly by husband and wife: *Johnson v. Kessler*, Ct. App. Ky., Oct. 9, 1888.

FIRE INSURANCE.

Limitation of suit to twelve months after loss, where the last day of the twelve months falls upon Sunday, does not bar an action commenced on the Monday following: *Owen v. Howard Ins. Co.*, Ct. App. Ky., Dec. 4, 1888.

INTERSTATE COMMERCE LAW.

Discrimination in passenger fares is not established by proof of the issuance of pass to a person who is assumed not to be entitled to a pass, when it is also proved that the pass was not used and had expired by its terms: *Griffes v. B. & M. R. R. Co.*, The Commission, Oct. 8, 1888.

Jurisdiction of the United States Courts, over actions brought for violations of this law, is not dependent upon the fact of diverse citizenship, and under the Act of 1887 exists only in the Courts of the District in which a corporation defendant has been incorporated and has its chief office: *Connor v. V. & M. R. R. Co.*, U. S. C. Ct. E. Dist. Mo., Oct. 5, 1888.

Jurisdiction of the Commission extends to commerce between points in the same State, passing, in transit, through another State;

this is interstate commerce and subject to regulation under the provisions of the Act : *N. O. Cotton Exchange v. C. N. O. & T. P. R. R. Co.*, The Commission, November 26, 1888.

Rates which are just and reasonable from selected manufacturing points through the entire territory east of the Missouri River and west of the Atlantic seaboard, are *prima facie* just and reasonable from all other points in the same territory : *Re Tariffs of the Transcontinental Lines*, The Commission, Oct. 24, 1888.

JURISDICTION.

Federal Court has jurisdiction, where the parties are citizens of different States, to entertain a bill in equity to vacate an order of sale of real estate made by a State Probate Court and the proceedings thereon, upon the ground of fraud and collusion with the purchaser on the part of the guardian who made the sale : *Arrowsmith v. Gleason*, S. Ct. U. S., Jan. 14, 1889.

State Courts have jurisdiction to enjoin the removal and destruction of anchors, moorings, and buoys appurtenant to a wharf on navigable waters : *Crescent City Wharf & Lighter Co. v. Simpson*, S. Ct. Cal., Oct. 26, 1888.

State Courts have exclusive jurisdiction over an action between residents of the same State on a contract to pay royalties for the use of a patented invention : *Hubbard v. Palmer's Admr.*, S. Ct. Pa., Jan. 7, 1889.

State Legislature may authorize the building of a bridge or other structure, tending to obstruct the navigation of a navigable river altogether within its own border, provided Congress does not interfere : *G. & B. R. Nav. Co. v. C. O. & S. W. R. R. Co.*, Ct. App. Ky., Dec. 11, 1888.

LANDLORD AND TENANT.

Building with defective walls was leased to a tenant who had full opportunity to observe and ascertain its condition, which was clearly apparent, there being no express warranty, nor any fraud or misrepresentation ; the landlord was not liable to the tenant for damages caused by the falling of the walls : *Davidson v. Fisher*, S. Ct. Col., Nov. 16, 1888.

LIBEL AND SLANDER.

Communication to wife by husband of slanderous words in regard to a woman is a publication : *Sesler v. Montgomery*, S. Ct. Cal., Dec. 3, 1888.

Publications of mercantile agencies, informing their subscribers generally, and not simply in confidence to one interested therein, as to the pecuniary standing of merchants, are not privileged communications : *Bradstreet Co. v. Gill*, S. Ct. Tex., Nov. 27, 1888.

LIFE INSURANCE.

Mutual Company, organized on assessment plan, issued policies or certificates of membership, agreeing, in case of death, to make an assessment upon members in good standing within ninety days from date of proof of death of insured and to pay the sum collected, less ten per cent., to the beneficiary named in the certificate, provided that such payment should not exceed \$5000; where at the date of death there were policies or certificates in force upon which, had the assessments been made and collected as stipulated, the full amount named in the certificate could have been realized, but where no assessments were made within the time provided for, the beneficiary named in the policy was entitled to a judgment against the company for the maximum amount named in the certificate: *Kaw Valley Life Assn. v. Lambs*, S. Ct. Kan., Oct. 6, 1888.

LIMITATION.

Inclosure of land is not necessary to constitute such adverse possession as will ripen into title; there are other ways of holding possession of land besides inclosing it by a fence: *Beecher v. Galvin*, S. Ct. Mich., Oct. 5, 1888.

Res adjudicata by decree in another action may be introduced into a depending cause as conclusive evidence of amount to be decreed; having arisen after the institution of the latter proceeding, it is properly new matter, to be set up by a supplemental bill, but it is not a new cause of action, and the statute of limitations cannot apply: *Jenkins v. International Bank*, S. Ct. U. S., May 14, 1888.

LIQUOR LAWS.

Sale of liquor within three miles of church, when prohibited by statute, does not cover a contract to sell, made within the prohibited distance and accompanied by payment, when the liquor sold was actually more than three miles from the church, in the stock of the vendor, who was a licensed dealer, and was to be delivered by express to the vendee, at the latter's charges: *Herron v. State*, S. Ct. Ark., Dec. 15, 1888.

MARRIED WOMEN.

Conduct in pais may operate to estop a married woman in a controversy relating to her real estate, notwithstanding her coverture and the fact that no fraud is shown: *Galbraith v. Lunsford*, S. Ct. Tenn., Oct. 18, 1888.

MORTGAGE.

Agreement to reconvey on payment of a stated sum within one year was made contemporaneously with a conveyance of land, such agreement being signed by the vendees only and no agreement being made by the vendor, nor any loan being referred to; two days afterwards the vendees leased the land to the vendor for one year at a stated

rental; the transaction did not constitute a mortgage: *Gassert v. Bogk*, S. Ct. Mont., Sept. 15, 1888.

NEGLIGENCE.

Contributory negligence on the part of the driver of a vehicle will not be imputed to one who rides on the highway in such vehicle by invitation, neither exercising nor assuming any control over its movements, and who is injured by an accident occasioned by a defect in the highway: *Nesbit v. Town of Garner*, S. Ct. Iowa, Oct. 8, 1888.

Employé of corporation, having full control of the latter's timber-yard, and who employs and discharges men, is to be regarded as a vice-principal, and the person upon whom the care and management of the yard devolve in his absence is to be regarded as a temporary vice-principal; consequently, the negligence of the latter, causing injury to the yard-employé, is not the negligence of a fellow-employé: *Baldwin v. St. Louis, K. and N. W. Ry. Co.*, S. Ct. Iowa, Oct. 2, 1888.

NUISANCE.

Proposed cemetery near residences which have been occupied for years, when it appears that the cemetery will be upon higher ground than the residences, and that the drainage therefrom will poison the wells and the odors injuriously affect the health of the neighborhood, will be enjoined as a nuisance: *Jung v. Neraz*, S. Ct. Tex., Oct. 16, 1888.

PATENTS.

Bill to cancel a patent obtained through fraud may be maintained by the United States: *U. S. v. American Bell Tel. Co.*, S. Ct. U. S., Nov. 12, 1888.

PRINCIPAL AND SURETY.

Surety on guardian's bond took a mortgage on the guardian's land as indemnity; the ward lived with his guardian from childhood, was ignorant, dissipated, and of weak mind, and was not aware of the suretyship; on his reaching his majority, his guardian fraudulently obtained his signature to a full receipt and release, by means whereof the guardian secured a final discharge from the Court, although he had never paid his ward a dollar; the guardian then procured from the surety a release of his mortgage, the latter looking only to the Court record, and making no inquiry of the ward; under these circumstances the ward was not estopped from asserting the surety's liability on his bond: *Gillette v. Wiley*, S. Ct. Ill., July 18, 1888.

PUBLIC OFFICES.

Sureties on bond of clerk of Court for his second term are not released from liability for a defalcation occurring after the approval of their bond, by the failure of the board of supervisors, as directed by

the Iowa Code, to require the clerk to produce and account for the public funds in his hands before entering upon his second term, nor by the false representation by the supervisors that their duty in this respect had been performed: *Palmer v. Woods*, S. Ct. Iowa, Oct. 8, 1888.

RAILROADS.

Intoxication does not excuse want of ordinary care and prudence on the part of a passenger, and a railroad company is not bound to exercise a higher degree of care towards a person partially intoxicated than is required in the case of persons not intoxicated: *Miss. Pac. Ry. Co. v. Evans*, S. Ct. Tex., Oct. 12, 1888.

SALE.

Delivery of grain to elevator owner under a contract that the latter could return the same on paying the highest market price therefor, and, if he refused to do so, the grain might be withdrawn upon payment for the weighing, but not the storage, the grain being mixed with other grain from which the warehouseman was from time to time making shipments, constitutes a sale, not a bailment: *Barnes v. McCrea*, S. Ct. Iowa, Sept. 10, 1888.

Reasonable time within which an unsound horse may be returned to a seller, who has warranted his soundness, is a question for the jury, even though he is retained by the purchaser for as long a period as ten weeks without an offer to return him: *Gridley v. Globe Tobacco Co.*, S. Ct. Mich., October 12, 1888.

TAXATION.

Post trader on Indian reservation is an agent of the National Government in the performance of its treaty obligations to the Indians, and therefore his stock in trade is exempt from taxation by the authorities of the Territory in which the reservation is situated: S. Ct. Wy., Sept. 1888.

TELEGRAPH COMPANIES.

Failure to deliver message sent to a family physician calling upon him to attend a woman in her confinement, renders the company liable in damages at the suit of the husband, and the increased suffering of the wife and the injury to her feelings are proper elements of damages: *West. Un. Tel. Co. v. Cooper*, S. Ct. Tex., Oct. 23, 1888.

WILLS.

After-acquired personalty will pass under a prior will: *Nichols v. Allen*, S. Ct. Tenn., Nov. 1, 1888.

JAMES C. SELLERS.

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THE SOVEREIGN STATE.

The recent decisions of the Supreme Court of the United States in the liquor cases, *Mugler v. Kansas*, and *Kansas v. Ziebold* (1887), 123 U. S. 623, and *Kidd v. Pearson* (1888), 128 Id. 1; and in the oleomargarine cases, *Powell v. Pennsylvania*, and *Walker v. Pennsylvania* (1888), 127 Id. 178, are of much interest to constitutional lawyers, as indicating the wide scope of the legal functions of government by the States. The first three of these cases decided that statutes prohibitory of the manufacture and sale of intoxicating drinks, except for certain special purposes, did not contravene any provisions of the Constitution of the United States. The other cases ruled that a statute of Pennsylvania, which absolutely prohibited the manufacture and sale of oleomargarine throughout the State, was not unconstitutional.

The constitutional provision invoked by the assailants of the statutes in question was the familiar injunction of the first section of the Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The contention before the court was chiefly confined to the latter part of the section in question, namely, to the inhibition on a State's deprivation of liberty or

property without due process of law, and on its denial of the equal protection of the laws. The earlier provision, against a State's abridging the privileges or immunities of citizens of the United States, received a construction in the *Slaughter House Cases* (1872), 16 Wall. 36, which practically eliminated it from discussions relating to the power of the States, as governments, to legislate concerning their own citizens. A distinction was there for the first time made, judicially, between citizenship in the State and in the United States [see 27 AMERICAN LAW REGISTER, "Citizens"], and the privileges or immunities within the protection of the earlier portion of the Fourteenth Amendment were confined to those which arise out of the nature and essential character of the national government, the provisions of the Constitution, or its laws and treaties made in pursuance thereof. The privilege of the writ of *habeas corpus*, of protection while on the high seas or within a foreign government, of the use of the navigable waters of the United States, and the like, were named as instances of such immunities. The fundamental rights of the individual as such—the right to acquire property and pursue happiness without molestation—were declared to be privileges and immunities of citizens of the States, and, as such, without the sphere of the protection of the clause under consideration. The definite protection of the Federal Constitution against State interference with the citizen's fundamental rights, from the time of this decision, has accordingly been sought in the later provisions of the section, where the States are prohibited from taking life, liberty or property without due process of law, and from denying to persons within their respective jurisdictions the equal protection of the laws.

The significance of the liquor and oleomargarine cases referred to is in the extent to which they have recognized the broad functions of the States, as governments, to legislate concerning their own internal affairs, without antagonizing these specific restraints upon the impairment of individual rights.

The six cases known as the *Granger Cases* (1876), beginning with *Munn v. Illinois* and ending with *Stone v. Wisconsin*, reported in 94 U. S. pp. 113 to 187, marked an era in the

constitutional law of the land. They asserted, and applied new conditions, the principle of the common law, that, where private property is devoted to a public use, it is subject to State regulation in respect to the rates or charges for such use imposed upon the public by the owner. The court, in the leading case of *Munn v. Illinois*, upon this principle, sustained a State law fixing a maximum of charges for the storage of grain in warehouses in Chicago and elsewhere in Illinois. The other decisions declared the validity of State laws, fixing a maximum rate for transportation of freight and passengers on certain railways. The inhibition of the Fourteenth Amendment against the deprivation of property, without due process of law, was held as of operative effect upon private property only, and not upon property affected with a public interest, as that of public warehousemen and common carriers. It was said in the first of these cases, however, that, even as to property which was strictly *juris privati*, the right of regulation of its use and of the price of its use always existed, the only effect of the Amendment, as to it, being to prevent the State from regulation to the extent of deprivation. The special significance of the *Granger Cases* is, that in them the Supreme Court, for the first time since the adoption of the latest amendment to the Constitution, directed marked attention to the scope of the State's sovereign powers affecting the liberty of the individual, and affirmed the existence of broad and wide powers of legislation.

Two different and, in some respects, antithetical forces or tendencies are noticeable in the development of the law of constitutional limitations upon the States. The first is what might be called the centripetal tendency, or tendency towards the emphasis of the Federal, rather than the State, functions of legislation under our dual systems of government, State and National. This tendency prominently appears through all the years of the formative period of our body of constitutional law. Marshall and his associates were making the nation. A constitution framed in a time of weakness, for the purpose of welding together into one sovereignty a number of independent autonomies, was being tested. If the new government was to live and grow strong in the midst of thriving commonwealths, it was necessary that the powers given to it should be liberally

construed in accordance with the purpose of those who called it into being. Accordingly, a series of decisions, great in the principles they declared, and far-reaching in their effect upon our national life, early put beyond the reach of successful assault the doctrine of the supremacy of the Federal government. Many of these decisions, as *McCulloch v. Maryland* (1819), 4 Wheat. 316; *Gibbons v. Ogden* (1824), 9 Id. 1; and *Brown v. Maryland* (1827), 12 Id. 419, directly discussed the relations between Federal and State authority. Of the first of them William Pinckney said, "It is a pledge of the immortality of the Union." Other decisions, as *Fletcher v. Peck* (1810), 6 Cr. 87, and *Dartmouth College v. Woodward* (1819), 4 Wheat. 518, concerned only the relations of the individual to the State, in the light of the Federal limitations upon the State, as contained in the Constitution of the United States. The latter, however, as effectually as the former, tended to the dominance of National power, by declaring the value to the citizen of the United States, of the specific limitations upon State action which the National Constitution established.

But through all this period of development of the nation, as well as later, there was full recognition of the State's broad governmental functions. This is particularly noticeable in *New York v. Miln* (1837), 11 Pet. 102, and *The License Cases* (1847), 5 How. 504. These cases were decided by a court constituted very differently from that of the period of the dominance of Marshall and Story. But its utterances, in so far as they consider the scope of State legislative power, unaffected by the grant of power to the United States, are wholly in accord with those of the earlier time.

The court in *New York v. Miln* stated these as impregnable positions: That a State has the same undeniable, unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to those ends, where the power

over the particular subject or the manner of its exercise, is not surrendered or restrained in the manner just stated.

Upon the general question of the extent of the grant of power to the Federal government, the decision in the *Passenger Cases* (1849), 7 How. 283, is perhaps more satisfactory than the opinion in this case, and more in accord with the law as laid down by the great Federalist judges, who gave to the Supreme Court its early character. But no dissent is possible from the statement of the law made by Mr. Justice BARBOUR in *New York v. Miln*, regarded as an expression of the principles of government by the State, when unaffected by the limitations of the Federal constitution.

Notwithstanding these views as to the extent of State power, the great struggle for the first seventy years of our national life was for supremacy of the Nation over the State. This supremacy was secured in its amplest form, and with the adoption of the Fourteenth Amendment the Federal Constitution became more than ever, a thing of dignity and worth, by whose words the validity of every action of a State or its officers might be tested.

The Supreme Court, as constituted since the civil war, has faithfully maintained, and indeed extended, the National principle. In *Juilliard v. Greenman* (1883), 110 U. S. 421, the latest Legal Tender case, it has affirmed the power of Congress to make the treasury notes of the United States a legal tender in payment of private debts, in time of peace as well as in time of war. It has stricken down State laws, otherwise clearly within the power of the State to enact, because they trespassed, though never so slightly, upon the grant of power to the Federal government. The many instances where State tax or police laws directly affecting interstate commerce have been overturned, are in point. *Philadelphia Steamship Company v. Pennsylvania* (1886), 122 U. S. 326; *Western Union Telegraph Company v. Pendleton* (1886), Id. 347, and *Bowman v. Chicago and Northwestern Railway Company* (1887), 125 U. S. 465, are very recent cases in illustration.

The development of industrial and commercial activities has been so great during the last twenty years, and there has been such a growing necessity, because of the complex social and

business life of the people, for the exercise of governmental functions by the States, that we would naturally expect that more particular attention would have to be given by the courts to the State's powers under our scheme of government. The present era, therefore, while showing no relinquishment or abatement of the nation's acknowledged claim to an undivided sovereignty within the sphere of its grant of powers, has been eminently fruitful of inquiry into the scope of the State's functions.

It is the era of the *centrifugal* tendency.

The *Granger Cases* were the first marked expression of this tendency under the new conditions. It is said that, when *Munn v. Illinois* was first considered in conference by the Supreme Court of Illinois, it was agreed that the particular exercise of legislative power there attempted was clearly unconstitutional. It was remarked by one of the justices, who afterwards saw no objection to the act on constitutional grounds, that the legislature might as well prescribe by law the price he should pay his tailor for his coat, as to pass an act of that kind. See Paper of James K. Edsall, in Reports of American Bar Association, 1887, pp. 288, 298.

The Supreme Court of the United States not only sustained the law then under consideration, but has since gone far towards making the sartorial figure of the Illinois justice something more serious than a jest. It is possible the Court may yet say, not only that the price of coats may be fixed by law, but that the propriety of wearing coats at all may be determined by the legislature. Since the decision in *Powell v. Pennsylvania* (the soundness of which is not here questioned), it is difficult to tell, in advance, at what point the Court will stop the exercise of the discretion of the legislature of a State, when the occasion for legislating at all upon the subject exists.

The latest statement by the Supreme Court of the law of the particular questions discussed in the *Granger Cases* is found in *Dow v. Beidelman* (1887), 125 U. S. 680. From that case it will be seen that the State legislatures may regulate the charges of public corporations to any extent, short of confiscation of their property. And the Court will not let "water"

pass for money, in determining whether any particular act reducing the charges, and consequently the income, of corporations, works a confiscation of their property by impairing their dividend-earning or interest-earning capacity.

The history of the liquor cases is familiar. *Bartemeyer v. Iowa* (1873), 18 Wall. 129, was the first of the series decided after the adoption of the Fourteenth Amendment. The Court passed upon the Iowa prohibitory law of 1851, sustaining it as a proper legislative measure, within the State's comprehensive police powers. It appeared that the specific liquor in question was not shown to have been owned by the defendant before the passage of the law, and the Court declared that there was no protection for him in the Fourteenth Amendment. In the opinion, delivered by Mr. Justice MILLER, it was said, however, that if the question were fairly before the Court that the glass of liquor was in existence at the time the State of Iowa first imposed an absolute prohibition on the sale of such liquors, two very grave questions would arise, namely, *First*, Whether this would be a statute depriving him of his property without due process of law; and, *Secondly*, whether, if it were so, it would be so far a violation of the Fourteenth Amendment in that regard, as would call for judicial action by the Court. These expressions of doubt as to the possible extent of State power in dealing with the subject matter were repeated in the next case of the kind, *Beer Company v. Massachusetts* (1877), 97 U. S. 25-32. The point decided in that case was that no charter right to manufacture intoxicants could protect against the subsequent prohibition of all such business. But the Court was careful to express no opinion as to whether liquor actually in existence when the law was passed or took effect, was subject to practical destruction at the hands of the State, without compensation.

In *Foster v. Kansas* (1884), 112 U. S. 201, the Court reaffirmed the doctrines of *Bartemeyer v. Iowa* and *Beer Company v. Massachusetts*.

In *Mugler v. Kansas*, *supra*, the whole general question came before the court upon facts requiring the determination of the points considered doubtful in the earlier cases. Mugler was indicted under a rigid prohibitory act, passed February

19, 1881, which took effect May 1, 1881. One of the counts in the indictment was directed against his sale, after the act took effect, of liquor manufactured by him before its passage. The decision, which was rendered by Mr. Justice HARLAN, in a very comprehensive way established the State's right to legislate so as to deprive of value the liquor actually in existence before the passage of the act.

Another point, not definitely raised in the previous cases, was also raised and decided here, namely, whether the law's impairment in, or deprivation of, value of property, real and personal, adapted chiefly or solely for brewery purposes, was a *taking* without due process. The lower courts had been divided in opinion. The Supreme Court of Kansas, in *Kansas v. Mugler* (1883), 29 Kan. 252, and the Circuit Court of the United States for the Northern District of Georgia, in *Weil v. Calhoun* (1885), 25 Fed. Rep. 865, had sustained the State's power to pass such laws; whereas, Judge BREWER, of the Circuit Court of the United States for the District of Kansas, had held in *State v. Walruff* (1886), 26 Fed. Rep. 178, and in the *Ziebold Case* (1886), that such a law was a clear invasion of individual rights of property. The Supreme Court held that all such property rights must give way, or rather that they did not exist, before the State's sovereign right, under its police power, to protect the health, morals and general welfare of the people. The court said (p. 669): "The power which the States have, of prohibiting such use (for certain forbidden purposes) by individuals, of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot, be burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted by a noxious use of their property to inflict injury upon the community. The exercise of the police power, by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance is

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abated; in the other, unoffending property is taken away from an innocent owner."

It was objected in *Kansas v. Ziebold*, *supra*, decided with the *Mugler* case, that the legislature could not arbitrarily declare that to be a common nuisance which had theretofore been recognized by the law, and wipe out of existence *bona fide* investments, made upon the faith of such recognition. The court answered: "The statute is prospective in its operation, that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the legislature to be injurious to the community." This decision declared legal the confiscation and absolute destruction, by the court officers, of the glasses, bottles and other property of the kind in liquor establishments, after the law went into effect. It also took away, perhaps, nine-tenths of the value of the machinery and fixtures used in the manufacture and sale of the prohibited articles.

Finally, in *Kidd v. Pearson*, *supra*, all the doctrines of *Mugler v. Kansas* and *Kansas v. Ziebold* were restated and reaffirmed.

The difference between the *Granger Cases* and the *Liquor Cases* is, that in the former cases the right of State regulation of a public business was extended to *limiting* the prices to be charged in conducting it, while, in the latter, the right of absolute *destruction* of the business and of the value of the property invested in it was recognized. The latter cases were therefore a very material advance upon the former.

The extension of the State's power over the property and occupations of its citizens, in these cases, was of course made with reference to the particular facts before the Court—the grave and serious menace of the liquor traffic to the public interests, and the common knowledge of the demoralization of the people from the excessive use of intoxicants.

The court, however, did not stop at the liquor cases. Within a few months of the decision in *Mugler v. Kansas* came that of *Powell v. Pennsylvania*, *supra*, wherein the State was declared competent to prohibit the manufacture and sale of oleomargarine, to take from the manufacturer his property by depriving it

of all value, and from the seller, as well as the manufacturer, his business, by enjoining him from continuing in it. Large investments were shown to have been made in machinery specially adapted for the manufacture of the prohibited article, and valuable only as old iron with the law in force. It was held the State's arm could not be stayed by the requirement that compensation be made for this loss.

The fundamental right to pursue a lawful calling was insisted upon in argument against the law. The Court answered that the right to pursue ordinary callings or trades and to acquire, hold, and sell property is subservient to the State's right, through the legislature, to protect the public health and morals. It was declared to be entirely a matter of legislative discretion, what measures to take, to remedy or remove, a particular evil which seemed to exist; the only qualification being, that an act of legislation having no possible relation to the objects sought by the legislation, could not be sustained. The Court was unable to declare, in the face of the recognized presumptions in favor of the *bonæ fidei* of acts of the legislature, that the traffic in oleomargarine was not an injury to the public, or that the legislature, in forbidding it, did not intend to remedy what it deemed, and what was, a public evil.

These cases came to the Supreme Court, as did the liquor cases, with judgments of the lower courts opposed to each other on the questions in dispute. The Court of Appeals of New York had, in *People v. Marx* (1885), 99 N. Y. 377, held such laws to be unconstitutional, as unwarrantably interfering with the liberty of the citizen. The Supreme Court of Missouri, in *State v. Addington* (1882), 77 Mo. 110, and the Supreme Court of Pennsylvania in the cases under review, had sustained them.

The distinct advance here made upon previous adjudications of the kind, was in the affirmance of the right of the State absolutely to deprive of all value and to destroy property connected with a business which was not clearly and unmistakably inimical to the interests of the public.

The latitude that was here given to the legislature, to declare not only the extent to which it will exercise its power of redressing a conceded public wrong, but also to declare the

existence of the wrong to be redressed, makes these last cases advanced landmarks of the State's governmental power affecting individual rights.

That the decisions are sound and right is not questioned by the writer, although the principle upon which they were ruled has met with disapproval by at least one eminent writer on constitutional law: See 2 Hare's American Constitutional Law, 773-776 (1889). It seems more in accordance with the American theory of popular government through representatives, that the legislature, rather than the courts, should determine questions of public policy as to the possession of property and the exercise of personal liberty. The courts, it is true, are the conservators of individual rights protected by the constitution. But they are not to set up their own theory of government, outside of the written constitutions, and test legislative acts by that theory. In a complex social system, such as ours is getting to be, the tendency necessarily must be towards affirmative exercise of governmental powers. The clashing of diverse individual interests is anarchical in tendency.

A *laissez faire* democracy is not a practical democracy. Sixty millions of people must have laws. When interests clash and laws are demanded, the practical question is, not whether a State may act by its legislature for the purpose of declaring or redressing a wrong, but whether it is prohibited from so acting. The Supreme Court of the United States, in the decisions considered, has merely given the benefit of the doubt to the State, rather than to the individual; to the people, rather than to the person.

The limit to State action that is insisted upon by that court is stated and illustrated in *Yick Wo v. Hopkins* (1885), 118 U. S. 356, 369, where the Court said: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." In this case a municipal ordinance of California, which made it possible for the city authorities, whose duty it was to license laundrymen, to

withhold licenses from persons of a certain race, arbitrarily and without reference to the qualifications of applicants, was held to be clearly within the inhibition of the constitution. See *Dent v. West Virginia* (1889), 129 U. S. 114, 124, where this principle is very recently recognized.

The broad sovereignty of the State within the Nation, thus recognized, is the true State sovereignty of the Constitution. It was left for great justices of the Federalist school to declare these "State rights" as legitimately belonging in our system of government.

Calhoun and the doctrinaires of his school would have erected the State upon the ruins of the Nation. Had they succeeded, they could have built no fairer structure than that which has since been raised by those whose theories they condemned. The phrase "State sovereignty" has been rescued from its friends, and given its true meaning in our governmental scheme.

"Defamed by every charlatan
And soil'd with all ignoble use,"

its legitimately wide scope has been declared, and its rightful domain established. It is the best tribute to the genius of HAMILTON and MARSHALL, that a government of their creation, after achieving its own promised destiny of strength and vigor, should be able, through its courts, to declare, and by its arm to enforce, that comprehensive sovereignty of the States which belonged as essentially in their system as that of the supremacy of National authority itself. There was needed the triumph of their principle of nationality, before the principle of sovereign statehood could be broadly declared and worked out.

A. H. WINTERSTEEN.

Philadelphia.

STATUTES RELATING TO TELEPHONE COMPANIES.

(Continued.)

Indiana also limited the rental charged for the use of telephones, by the statute in force from July 18, 1885 (Laws, p. 227; Rev. Stat. ed. 1888, chap. 43, § 4192,e.):—

§ 1. No individual, company or corporation, now or hereafter owning, controlling or operating any telephone line in operation in this State, shall be allowed to charge, collect or receive, as rental for the use of such telephones, a sum exceeding three dollars per month, where one telephone only is rented by one individual, company or corporation. Where two or more telephones are rented by the same individual, company or corporation, the rental per month for each telephone so rented shall not exceed two dollars and fifty cents per month.

§ 2. Where any two cities or villages are connected by wire, operated or owned by any individual, company or corporation, the price for the use of any telephone, for the purpose of conversation between such cities or villages, shall not exceed fifteen cents for the first five minutes, and for each additional five minutes no sum exceeding five cents shall be charged, collected or received.

§ 3. Any owner, operator, agent, or other person, who shall charge, collect or receive for the use of any telephone, any sum in excess of the rates fixed by this act, shall be deemed guilty of a public offense, and, on conviction, shall be fined in any sum not exceeding twenty-five dollars.

Since the cases cited (ante, page 73.), one Johnson was indicted, tried and convicted in the circuit court of Knox county for charging a rental in excess of the statutory provisions, being the owner of a telephone line in the city of Vincennes: *Johnson v. State*, S. Ct. Ind., January 24, 1888.

The conviction was based upon an attempt to evade the statute, by charging the excess as rental for use by "nonsubscribers," without regard to the number of times the telephone was so used, and even if it were not so used at all. The court distinctly affirm the constitutionality of the Statute and their former rulings in *Hockett v. State* (1885), 105 Ind. 599, and *Telephone Co. v. Bradbury* (1885), 106 Id. 1.

The legislature has since been appealed to, and, by an act approved February 27, 1889, repealed the Statute of 1885, "an emergency existing for the immediate taking effect" of the repeal.

Kentucky raises part of her revenue from telephone companies, the General Statutes (ed. 1888, p. 1046), Art. IV., § 5, providing—

§ 5 The president or general manager of every telephone company, on the first day of July in each and every year, shall report to the Auditor the gross amount of the receipts, and shall pay the Auditor one-fourth of one per cent. on the gross receipts of his company, on all its business within this Commonwealth, in lieu of all other State tax; and the Auditor shall give and deliver his receipt of any and all taxes so paid.

Maryland has provided for telephone companies by amendments to her Revised Code of the Public General Laws, title xxiii., art. xi. (ed. 1878, p. 317); ch. 360, of the Laws of 1884, p. 481 (in effect from April 8, 1884), providing that corporations might be formed—

Sec. 24. Class II. For constructing, owning or operating telegraph or telephone lines in this State, where the principal office of said corporation is located in this State.

And ch. 161, of the Laws of 1886, p. 265 (in effect from April 7, 1886), provide, also, for the formation of corporations—

Sec. 24. Class II. A. For the transaction of any business in which electricity, over or through wires, may be applied to any useful purpose.

The general provisions for the construction, operation and ownership of telegraph lines, were also extended by the above mentioned Law of 1884, by adding a new section—

Sec. 136. A. The provisions of the preceding sections, numbered one hundred and twenty-seven to one hundred and thirty-six inclusive, in relation to telegraph companies, shall likewise apply to and have full force and effect in respect to telephone companies created under the provisions of this act.

And by the above mentioned Law of 1886, by adding a new section—

SEC. 175. A. Any corporations formed under class eleven of section twenty-four of the act of which this act is amendatory, or under class eleven A. of section twenty-four of the act of which this act is amendatory, as said section and class may have been or may be hereafter amended, shall have the powers which are conferred upon telegraph companies incorporated under said act, of which this act is amendatory, by the one hundred and twenty ninth section of said last mentioned

act, and may construct and lay any part of its said line or lines under ground, on any route on which it is authorized to construct such lines, in whole or in part, above ground, and may acquire by condemnation any easements or interests in land which may be necessary to give effect to the purposes for which such corporation was formed, in the manner set forth in sections one hundred and seventy to one hundred and seventy-five, both sections included, of the said act of which this act is amendatory.

SEC. 175. B. *Provided, however,* That all corporations incorporated, or to be incorporated, by virtue of said section twenty-four, class eleven, or by virtue of said section twenty-four, class eleven A., except such corporations as are now in practical operation and have laid or constructed their lines, or any part thereof, in the city of Baltimore, shall, before using the streets or highways of Baltimore city, either the surface or the ground beneath the same, obtain a special grant from the General Assembly of Maryland, and the assent and approval of the Mayor and City Council of Baltimore city.

Minnesota provides for the incorporation of telephone companies, under a general law (Gen. Stat. vol. 2, p. 301, ch. 34, title 1, § 1, as amended by acts of 1875, c. 14, § 1; 1885, c. 18; 1887, c. 161)—

§ 1. Any number of persons, not less than five, may associate themselves and become incorporated, for the purpose of building, improving, and operating railways, telegraphs, pneumatic tube lines, subway conduits for the passage, operation and repair of electric and other lines or pipes, canals, or slack-water navigation, upon any river, bay or lake, and all works of internal improvement which require the taking of private property, or any easement therein; * * * *

The use of public highways has been conferred (Gen. Stat. vol. 2, p. 313, ch. 34, title 1, § 42, as amended by act of 1881, c. 73, § 1)—

§ 42. Any telegraph or telephone corporation, organized under this title, has power and right to use the public roads and highways in this State, on the line of their route, for the purpose of erecting posts or poles on or along the same, to sustain the wires or fixtures; *provided*, that the same shall be so located as in no way to interfere with the safety or convenience of ordinary travel, on or over said roads or highways.

Mississippi has sought to "encourage and facilitate the construction of telegraph, telephone, and other like lines," by an Act, entitled as above, and approved, March 16, 1886 (Laws, p. 93.)—

SEC. 1. That any telegraph or telephone company, chartered or incorporated by the laws of this or any other State of the United States, shall, upon making due compensation, as hereinafter provided, have the right to construct, maintain and

operate telegraph or telephone lines through any public lands of this State, and on, across, and along all highways, streets and roads, and across and under any navigable waters, and on, along, [and] upon the right of way and structures of any railroad, and, in case of necessity, on, under, or over any private lands in this State; *provided*, that the posts, arms, insulators, and other fixtures of such telegraph or telephone lines be so erected, placed and maintained as not to obstruct or interfere with the ordinary use of such highways, railroads, streets or water, or with the convenience of any land owner, more than may be unavoidable.

SEC. 2. That whenever any such telegraph or telephone company desires to construct its lines on, along or upon the right of way and structures of any railroad, or upon or along the roadway of any incorporated turnpike, or in case it should be necessary to construct the same under, on, or over any private land in this State, the said telegraph or telephone company shall, by its agents, have the right peaceably to enter upon and survey, locate and lay out its said lines thereon, and may contract with the owner or owners of any such railroad for the use of its right of way and structures, or with any turnpike company for the use of its right of way, for telegraph or telephone purposes, and may agree and contract with the owner of any land for an easement therein, for the purpose of constructing, maintaining and operating its lines as herein provided; and in case said lands belong to the estate of any deceased person, then said company may agree and contract with the executor or administrators thereof, and if the same belongs to a person *non compos mentis* or a minor, then with the guardian; or in case said land be held by trustees of school sections, or any other trustees, then with such trustees; said executors, administrators, guardians and trustees being hereby declared competent to make such contracts, which shall be binding upon all parties in interest; and said executors, administrators, and guardians shall be liable in their respective bonds, to those interested for any money received by them under said contracts or agreements; and, if the parties and such company prefer, the question of such compensation shall be referred to arbitrators, mutually chosen, whose award, or, in case of disagreement, that of the umpire, shall be binding between the parties.

SEC. 3. That in case any telegraph or telephone company having the rights and privileges herein granted, for any cause shall not agree with the owner or owners of any land, or with the executor, administrator, guardian or trustees of the estate to which the same belongs, or with the owners, lessees or managers of any railroad or incorporated turnpike, on or in which an easement, right or privilege is sought, such telegraph or telephone company may file its petition in the office of the Clerk of the Circuit Court of the county in which said land is located; or in case of a railroad or turnpike, then in the office of the Circuit Clerk of any county in which any portion of the said railroad or turnpike may be located, or through which the same may run. Said petition shall designate the land or railroad and structures or turnpikes, as the case may be, and particular use, right, easement or privilege sought to be condemned. It shall also give the name of the petitioner, and shall give the place of residence, if the same be known, of the name or names [*sic*] of the reputed owner or owners of said property, or of the executor, administrator, guardian or trustee, and if the name and places of residence of such persons be not known to the petitioner, the petition shall so state; such petition shall be signed and sworn to by an officer, agent or attorney of the telegraph or telephone company.

SEC. 4. That such petition as hereinbefore provided for may be filed at any time, and the proceedings thereunder had shall be *in rem*, against such parcel or parcels of land, or against such railroad and structures or turnpike roadway; such petition and proceedings, in case the lands of private owners are proceeded against, shall only embrace or include in any one proceeding, the lands of one proprietor or owner, in case any right, privilege or easement is claimed or demanded in or along any railroad right of way and structures, or in or along any turnpike, then the property of but one such railroad or turnpike can be embraced in one petition.

SEC. 5. That it shall be the duty of the Clerk, upon the filing of such petition to cause a notice in general terms thereof, and of the time appointed for the inquest, to be served upon the owner or owners of said lands, guardians, executors or administrators or trustees, as hereinbefore provided, to be left at his or her, or their place, or places of residence, at least five days before such assessment, if such parties named in said petition reside in the county; and in case of a railroad or turnpike, the notice may be served upon any agent upon whom notice of any legal proceeding is hereby authorized to be served; if any such owner, or their places of residence are not known or stated in the petition, or if such owners or any of them reside out of the county, such notice shall be published by three consecutive weekly insertions in any newspaper published in the county in which such petition is filed, and if none be published in the county, then in some newspaper published in one of the cities or towns of Mississippi which shall be nearest said property, and a copy of such notice shall be mailed to such interested party by the said Clerk.

SEC. 6. That upon the filing of any such petition, the Clerk shall forthwith issue a writ, commanding the Sheriff to summon and to have in the office of said Clerk, or on or near said land, railroad or turnpike, at the time in the writ to be mentioned, and within ten days, in case the proceeding is against a railroad or turnpike company, or if the owners all reside in the county, and are known, or, if not, then within thirty days, nine good and lawful men, citizens of the county, from whom, and talesmen, if need be, five Commissioners shall be chosen, who shall be sworn by the Sheriff, or his deputy, to well inquire and true assessment make of the due compensation for the cash value and actual damage which the owner or owners of said land, railroad or turnpike company respectively, shall be entitled to have for the appropriation thereof, to the use of the petitioner, as prayed for, and a majority of said Commissioners may render said award; the said Commissioners may hear testimony of witnesses offered by either party, who shall be sworn by the Clerk, as to the cash value of the land sought to be appropriated by the petitioner, and the injury, then necessarily known to result to such owner, railroad or turnpike company, as the necessary and immediate consequence of the appropriation sought to be made by the petitioner, without reference to uncertain and remote benefits or disadvantages that may or may not occur in the future; the Clerk shall take down the testimony in writing, and the Sheriff or his deputy shall preserve order.

SEC. 7. That the said Commissioners may, if they so desire, inspect the road, structure or land, on which an assessment or privilege is sought, and the owners of any land, railroad or turnpike may intervene for their respective interests in the premises, and may have the writ of subpoena issued by the Clerk and executed by the Sheriff, for any witnesses, but no evidence shall be received in respect to the

title or ownership of the property, nor upon any question other than that of the cash value of lands sought to be appropriated by the telegraph or telephone company, and the injuries then necessarily known to result to such owner, railroad or turnpike company, as the necessary and immediate consequence of the appropriation sought.

SEC. 8. That if said commission shall fail to complete its inquiries and make an award the first day assembled, the Sheriff shall adjourn said Commission over from day to day, until the same is completed; and, in the event any of said commissioners shall, after having been sworn, and before the rendition of the award, become unable from sickness or other cause, to continue on said Commission, he may be excused therefrom by the sheriff, and another summoned in his place, who shall be sworn as the others were, and to whom shall be read the testimony of the witnesses who have before that testified in the case, and who shall act in lieu of the Commissioner so excused.

SEC. 9. That the Commissioners, after making their award as hereinbefore provided, shall make and sign a report of their proceedings in the premises, and shall deliver the same to the Sheriff, who, for any informality, may have the same corrected by said Commissioners, and said Sheriff shall make immediate return thereof, with the writ, and his actions thereon, to the said Clerk; and, upon the actual payment in cash, or tender of the same, to the person or company, or the said Clerk for the use of the same, entitled to receive the same, of the whole amount of the award made as hereinbefore directed, the said petitioner or its assigns, shall have the full and perfect right to enter upon the property described in said petition, and to have, possess and enjoy the easements, rights and privileges thereon, as the same are in the petition set forth and claimed; and a full record shall be kept in said Clerk's office, of all proceedings had under this Act.

SEC. 10. That for good cause shown by the petitioner, or any owner, railroad or turnpike company, by motion to the Judge of the Circuit Court [of the] district in which said proceedings were had, a new inquest and assessment may be had; *provided*, said motion shall state the grounds upon which said new inquest is asked, and be supported by the affidavit of the party applying therefor; that the award of the commissioners was contrary to the law and the evidence, and shall have filed therewith a certified copy of all the proceedings had and done on the premises, including a copy of all the evidence, of the hearing of which motion the opposite party shall have at least five days' notice; and said motion must be made within ten days after the rendition of the award, as above provided for, and not after; and if, upon a consideration of the matter, the Judge shall be of the opinion that the commissioners acted upon testimony that was irrelevant or incompetent, and that their award was contrary to the law, and such evidence as was competent and relevant, and that injustice has been done, a new inquest and assessment shall be ordered by him; and he shall order a new writ to issue and another inquest and assessment to be had, as on the first, at a day to be named by him, not less than five nor more than fifteen, after such order; *provided further*, that not more than one new inquest and assessment shall be allowed at the instance of the same party in reference to the same matter; and, *provided further*, that from all orders of said Judge, in reference to any proceedings under this Act, an appeal may be taken to the Supreme Court of this State, within thirty days from the making of any such

order, or from the final order therein made, the appellant being required to give security for the cost of the appeal, as in other cases; but no appeal shall hinder or delay a petitioner, who has paid or tendered to the party or parties, entitled under the award to receive the same, the amount of the award, from constructing and operating their lines on or over said property.

SEC. 11. That the sheriff may act by his regular sworn deputy, or the coroner may act as in other cases provided by law; and for any default of the clerk, sheriff, coroner, commissioner, witnesses or other persons, the penalty prescribed by law for like default in cases pending in the Circuit Court shall be enforced.

SEC. 12. (Provides for the fees of the commissioners and officers.)

SEC. 13. That at the time of filing of said petition, such telegraph or telephone company may be required to give security for the cost of the proceedings.

SEC. 14. (Repeal of inconsistent laws.)

And the Code of 1880, (§ 585, p. 190,) has been amended, "so as to increase the public revenue," by the Act, entitled as above, and approved March 8, 1888, (Laws, p. 17,) by laying a tax—

On each telephone company, seventy-five dollars, and, in addition thereto, on each telephone exchange, with twenty-five or less subscribers, five dollars; on same, with more than twenty-five subscribers or less than fifty subscribers, ten dollars; on same, with fifty subscribers or more, and less than twenty [75?] subscribers, fifteen dollars; on same, with seventy-five subscribers or more, and less than one hundred subscribers, twenty dollars; on same, with one hundred subscribers or more, and less than one hundred and fifty subscribers, thirty dollars; on same, with one hundred and fifty subscribers or more, and less than two hundred, forty dollars; on same, with more than two hundred subscribers, fifty dollars; and this shall be in lieu of all other taxes of telephone companies and telephone exchanges.

JOHN B. UHLE.

(To be continued.)

RECENT AMERICAN DECISIONS.

Supreme Court of Indiana.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY CO. v. BUCK.

If a brakeman, engaged in common labor on Sunday, in pursuance of a general contract with a railroad company, is injured by the negligence of the company, he may recover damages for such injury.

In an action by an administrator, for causing the death of his decedent and to recover damages by reason thereof, for the widow and children of the deceased, a general averment that such widow and children have sustained damages is sufficient.

If a brakeman is ignorant of a defect in a car coupling, which defect is not obvious and cannot be seen, except by stooping down and looking for it, he is not guilty of contributory negligence in going between cars to couple them.

Declarations of the brakeman made immediately after the injury, while being taken from under the car wheels, are admissible in evidence as a part of the *res gestae*.

If a special verdict is silent concerning any of the issues in the case, it will be assumed that the party having the burden of proof on them, failed to prove them.

A *venire de novo* will not be granted where a special verdict does not contain an affirmative or express finding upon some of the issues in the case.

APPEAL from Benton Circuit Court.

Buck, as administrator of the estate of George H. Bennett, deceased, commenced suit against the Louisville, New Albany & Chicago Railway Company, alleging that the company had wrongfully caused the death of the decedent, to the damage of his surviving widow and child. The complaint was in three paragraphs. It is charged in the first two paragraphs, that the intestate was in the employ of the railway company as brakeman, and that he was fatally injured while uncoupling cars, on account of dangerous and defective appliances and machinery which the company negligently supplied. The same facts, substantially, were stated in the third paragraph, with the addition that the accident and fatal injury to the plaintiff's intestate were caused by the careless and negligent habits, and by the incompetency, of the engineer who had control of the engine at the time the accident happened, and that the incompetency and negligent habits were known to the company and unknown to the intestate. No question was made as to the sufficiency of the complaint, except it was urged that

it did not sufficiently appear, by any averment therein, that the widow or child of the decedent sustained damage in any-wise, on account of the defendant's negligence.

The jury returned a special verdict, which, so far as they are material to the questions for decision, exhibited the following facts: The deceased, a man about thirty years of age, in good health, and of industrious habits, was in the employment of the defendant railway company as brakeman on a freight train. On Sunday night, November 25, 1883, the train of which he was one of the crew left Michigan City for La Fayette. Between 9 and 10 o'clock the train was stopped at the crossing of the Pan Handle Railroad, for the purpose of taking on more cars. It was part of the duty of the decedent to couple and uncouple cars which were to be attached to or detached from the train. Soon after the train stopped he went in between the engine and the car attached to it, for the purpose of uncoupling the car from the engine. The car was loaded with lumber, and belonged to the defendant company, but the decedent had never seen it until after it was loaded, when starting from Michigan City. The reach-rod which, when properly adjusted, held the brake-beam in place, was, and had been for several days, absent from the brake-beam, in front of the wheels on the car next to the engine. The absence of this rod was unknown to the decedent, but the jury found that it was or might have been known to the defendant. Its absence caused the beam to hang lower and more forward than it otherwise would have done; but the fact that the rod was gone, was not discoverable, except by one stooping down and looking under the car. While attempting to uncouple the car, being for some reason unable to get the coupling-pin out of the draw-bar, the decedent held the pin up as far as he could get it, and then signaled the engineer to move the engine forward. The engineer obeyed the signal, but immediately, and without warning, reversed the lever, and threw the engine back, crowding the decedent against the car, and then again moved forward. While so crowded back, and before he could recover or extricate himself from his position, the decedent's feet were caught by the defectively attached brake-beam, and he was thrown under and run over by the car, which was moving forward.

In this way, he received injuries which were particularly described, and which resulted in his death, the following morning. It was found that the decedent left a widow and child, as alleged in the complaint, and that they were damaged by his death in a specified sum. There was judgment for the plaintiff accordingly.

George W. Friedley, George W. Earley, and George R. Eldridge, for appellant.

E. P. Hammond, William B. Austin and Coffroth & Stuart, for appellee.

MITCHELL, J., January 10, 1889 (after stating the facts, as above). The averments in the complaint, relevant to the point thus made, are, that Bennett was in the employment of the defendant as brakeman at the time of his death, and that he left surviving him, as his next of kin and only heirs, his widow, Fidella J. Bennett, and his daughter, Longretta May Bennett, both of whom are still living,—the latter being four years of age. It is also averred that "said administrator brings this action for the use and benefit of said widow and child, who, by reason of the death of said decedent, as aforesaid, have sustained damages in the sum of \$10,000."

For the appellant it is insisted that the general averment that the widow and child of the decedent had sustained damages in a specified sum was not sufficient, but that the pecuniary loss, either present or prospective, resulting to them from the intestate's death should have been specially pleaded. *Regan v. Railway Co.* (1881), 51 Wis. 599, is relied on to sustain the view thus contended for.

Without pointing out the distinction between the case cited and that under examination, in respect to the question involved, it is sufficient to say it appears in the complaint in the present case, that the decedent was, at the time of his death, in the employ of the railroad company as a brakeman, and that he left a widow and one child four years old. It was an unavoidable inference, therefore, that he was in the vigor of manhood, and that he was at the time engaged in earning money for the support of his wife and child: *Kelley v. Railway Co.* (1880), 50 Wis. 381. Section 284, Rev. St. 1881, gives a right of

action to the personal representative, for the benefit of the widow and children or next of kin of one whose death has been caused by the wrongful act or omission of another, provided the former could have maintained an action against the latter had he lived. While there is some discord in the decisions of courts in respect to the right to maintain the action, even for nominal damages, without averring and proving actual pecuniary loss by those for whose benefit the suit is brought, there can be no doubt but that, within the rule generally prevailing, the law will imply substantial pecuniary loss in some amount to the wife and child, from the death of one who sustained the relation of husband and father to them, and who was at the time presumably receiving wages, and who was therefore possessed of the ability to discharge his obligation to support those dependent upon him: *Railroad Co. v. Weber* (1885), 33 Kan. 543; *Houghkirk v. President* (1883), 92 N. Y. 219; 1 Shearm. & Red. Neg. (4th Ed.), § 137.

Whatever the rule may require as applied to other cases, and in respect to the quantum or character of proof on the subject of pecuniary loss, there can be no doubt but that a general averment of damages in a case like the present is sufficient as against a demurrer to the complaint. It may be well to observe here, as applicable to this question, which is presented in another aspect later on in the record, that no precise rule for estimating the loss recoverable under the statute can be laid down. When the relation of the party whose death has been caused, to those for whose benefit the suit is being prosecuted, has been shown, and his obligation, disposition, and ability to earn wages or conduct business, and to care for, support, advise and protect those dependent upon him, the matter is then to be submitted to the judgment and sense of justice of the jury: *Commissioners v. Legg* (1883), 93 Ind. 523; *Tilley v. Railroad Co.* (1864), 29 N. Y. 252; *Castello v. Landwehr* (1871), 28 Wis. 522.

The appellant insists that the judgment ought to be reversed, and urges as one of the reasons that the jury found that the injury which resulted in the intestate's death was received on Sunday, while he was engaged at common labor in pursuance of a contract with the railway company, and that it was not

made to appear that the work about which he was engaged was a work of necessity. We had occasion to consider the question in *Railway Co. v. Frawley* (1886), 110 Ind. 18, where it was presented in substantially the same manner as in the present case. Our conclusion there was, that a person injured by the negligent omission of another to perform a legal duty, would not be denied a recovery, even though it appeared that the injured person was, at the time of receiving the injury, acting in disobedience of his collateral obligation to the State, which required of him the observance of the Sunday law. If the railway company violated its duty by furnishing machinery and appliances which it knew were defective, the danger to an employe, who was required to use the appliances, in ignorance of their defective condition, was the same on one day as on another. That they were being used on Sunday rather than on Monday, neither contributed to, nor was it the efficient cause of, the injury which gave rise to this action, nor can the railroad company now interfere and become the champion of the Sunday law as an excuse for its wrong, or to defeat a recovery: *Sutton v. Wauwatosa* (1871), 29 Wis. 21. It is quite true that a plaintiff will, in no case, be permitted to recover, when it is necessary for him to prove his own illegal act or contract as a part of his cause of action, or when an essential element of his cause of action is his own violation of law: *Holt v. Green* (1873), 73 Pa. 198; *Hall v. Coppel* (1868), 7 Wall. (74 U.S.) 558; *Steele v. Burkhardt* (1870), 104 Mass. 59; *McGrath v. Merwin* (1873), 112 Id. 467. But where he can prove his cause of action, without proving that he was violating the law, even though it appears incidentally that he was, at the time, acting in disobedience of some statute, unless his illegal act was the efficient or proximate cause of the injury complained of, or unless the illegal act or contract is the foundation of his action, a recovery may be sustained nevertheless: Cooley on Torts (2d Ed.), 178, 179.

Whoever travels about from place to place for the purpose of gaming with cards or otherwise, acts in violation of a criminal statute. It would hardly be claimed that a recovery against a common carrier would be denied, if it appeared incidentally in evidence, that a passenger, injured through the

carrier's negligence, was traveling in violation of the statute against gaming. Why should a brakeman, who is required to work in violation of the Sunday law, be denied a recovery? The gist of the action in the present case is the negligent failure of the railway company to furnish safe and suitable appliances, whereby the death of the plaintiff's intestate was wrongfully caused while he was in the company's service as a brakeman. The contract of employment and the time when the injury occurred, were mere incidents to, and were in no respect the foundation of, the action: *Railway Co. v. Frawley, supra*; *Frost v. Plumb* (1874), 13 AMERICAN LAW REGISTER, 537.

It may be conceded that the decisions in some of the States are not all consistent with the conclusions above stated; but, in our opinion, these conclusions are in accord with the better view of the subject, and have the support of the weight of authority.

The defendant presented to the court forty-three separate instructions, and asked that they be given the jury. Of these, twenty were given and the balance refused. The refusal to give these instructions is made the ground of complaint. It has frequently been ruled that where the jury has been required to return a special verdict, general instructions as to the law of the case are not proper. The court should explain to the jury distinctly what facts are material to be found within the issues, and give them such instructions as will enable them to find and settle the facts, so that the law may be applied to the facts found by the court: *Railway Co. v. Frawley, supra*; *Railway Co. v. Flanagan* (1887), 113 Ind. 488. Within this rule, an examination of the instructions given by the court leaves no doubt but that the jury were adequately directed in respect to the facts necessary to be covered by the special finding. Leaving out of view all of the facts found relating to the alleged negligence and incompetency of the engineer, and eliminating from the special verdict everything in the nature of conclusions of law, and it seems to us the facts found make a case justifying a recovery. They show that the railroad company failed in its obligation to supply its employe with safe and suitable appliances and machinery to do the work required of him, and that it required him to use machinery

which it knew to be defective. This established the company's negligence. The special verdict also shows that the defect in the machinery was unknown to the decedent; that it was not obvious, and could not have been discovered, except by stooping down and looking under the car. This showed that the employe was not guilty of contributory negligence in going in between the cars to uncouple them, notwithstanding the defective condition of the appliances. It is settled beyond controversy that railroad employes are presumed to understand the nature and hazards of the employment when they engage in the service, and that they assume all the ordinary risks and obvious perils incident thereto. Such risks are presumably within the employe's contract of service: *Electric Light Co. v. Murphy*, Supreme Court of Indiana, September 29, 1888.

This does not mean, however, that the latter may not repose confidence in the prudence and caution of the employer, and rest on the presumption that he has also discharged his duty by supplying machinery free from latent defects which expose the employe to extraordinary and hidden perils: *Car Co. v. Parker* (1884), 100 Ind. 181; *Hough v. Railway Co.* (1879), 100 U. S. 213. While the employer may expect that an employe will be vigilant to observe, and that he will be on the alert to avoid, all known and obvious perils, even though they may arise from defective tools and machinery (*Engine Works v. Randall* (1884), 100 Ind. 293), yet the latter is not bound to search for defects, or inspect the appliances furnished him to see whether or not there are latent imperfections in or about them which render their use more hazardous. These are duties of the master, and unless the defects are such as to be obvious to any one giving attention to the duties of the occasion, the employe has a right to assume that the employer has performed his duty in respect to the implements and machinery furnished: *Bradbury v. Goodwin* (1886), 108 Ind. 286; *Railway Co. v. Leverett* (1886), 48 Ark. 333; *Railroad Co. v. Gildersleeve* (1876), 33 Mich. 133; *Hughes v. Railroad Co.* (1880), 27 Minn. 137; Wood on Master & Servant § 376.

The facts found very clearly furnish a basis for the application of the foregoing principles, and these principles, when

applied to the facts found, sustain the judgment of the court upon the special verdict. Many of the instructions asked would, if they had been given, necessarily have required the jury to return very much of the evidence as part of their special verdict, while others would have required the statement of mere conclusions which the jury could not properly draw. For example, in one of the instructions the court was asked to require the jury to find what was the proximate cause of the death of Bennett. In another, the court was asked to require the jury to describe in their verdict the appliances attached to the car for the purpose of breaking it. The facts showing the manner in which the accident and injury occurred, and the condition of the car and the appliances attached having been particularly found and set out in the special verdict, it became a question for the court to determine whether or not the intestate's death was proximately caused by the negligent omission of duty on the part of the railroad company. We are unable to perceive how the court would have been aided in arriving at a correct conclusion, if the jury had been required to describe the appliances in their verdict. The material facts in that connection were that there inhered in the appliances a hidden or latent defect, which increased the ordinary and obvious perils of the service in which the intestate was engaged, and which made them an efficient agency in producing the fatal injury.

We have examined the other instructions asked and refused, and, without commenting upon them in detail, we need only say the court committed no error in refusing them.

It is contended that the court erred in overruling a motion made by the appellant for a *venire de novo*. In this we do not concur. It must now be accepted as settled that a special verdict will not be considered as so uncertain, ambiguous, or defective, as that no judgment can be rendered thereon, because some of the issues in the case are not affirmatively or expressly settled or determined thereon one way or the other. If the verdict is silent concerning any of the facts in issue, the court will assume, upon a motion such as that under consideration, that the party upon whom rested the burden of proof in respect to those facts failed to prove them. If the failure to find the

facts was contrary to the evidence, it may furnish a sufficient reason for a new trial; but the failure does not render the special verdict objectionable, nor does it afford any ground for a *venire de novo*: *Glantz v. City of South Bend* (1885), 106 Ind. 305; *Deeter v. Sellers* (1885), 102 Id. 458; *Mitchell v. Colglazier* (1886), 106 Id. 464.

It may be conceded that there are some merely evidentiary facts found in the special verdict, and that it also embraces many statements which are essentially conclusions of law. Notwithstanding all this, it seems clear to us that, stripped of all these, the verdict is yet sufficient to lead up to and support the judgment, and that the motion cannot be successfully urged on that account.

Questions are made and discussed concerning the propriety of rulings of the court, in admitting evidence, tending to show that the engineer who had the engine in charge at the time the decedent was injured, was negligent and incompetent. According to our view of the case, there was no reversible error in any of these rulings, for the reason that the special verdict sustains the judgment, even though all the facts pertaining to the competency or conduct of the engineer be eliminated from the case. While we have discovered no error in the rulings, we do not regard them of sufficient materiality to justify us in prolonging the opinion, by setting them out separately, and examining them in detail.

The only other question which requires consideration relates to the ruling of the court in admitting in evidence certain declarations of the decedent which were made immediately after he was injured, and, substantially, while he was being extricated from under the wheels of the car which had passed over him. The conductor of the train testified that he was on the caboose when he received notice that the decedent was hurt, and that he immediately ran forward and found him under the rear end of the second car from the engine. The following is the testimony of the conductor upon which the objection is predicated: "When I took him out I asked him, 'How did this happen?' He told me that he was uncoupling the engine from the first car, but could not get the pin clear out of the draw-bar, and had to hold it up, and hallooed to the engineer

to go ahead. He started, and by some cause 'threw the engine over' and came back against him before he could get out, and crowded him back against the car, and the brake-beam, catching his leg, pulled him down, and the cars ran over him." It is not always easy to determine when declarations, having relation to an act or transaction, should be received as part of the *res gestae*, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said, that declarations which are the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made, so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself: *Railway Co. v. Goddard* (1865), 25 Ind. 185; *Lund v. Inhabitants* (1851), 9 Cush. (Mass.) 36; *Com. v. McPike* (1849), 3 Id. 181; *Factory v. Barnes* (1884), 72 Ga. 217; *Insurance Co. v. Mosley* (1869), 8 Wall. (75 U. S.) 397; *People v. Simpson* (1882), 48 Mich. 474; *Keyser v. Railway Co.* Supreme Court of Michigan, June 23, 1887; *Kirby v. Com.* (1883), 77 Va. 681; *City v. Barbour* (1884), 62 Tex. 172; *State v. Horan* (1884), 32 Minn. 394; *Railway Co. v. Leverett*, *supra*; *State v. Ali Lois* (1869), 5 Nev. 99; *Railroad Co. v. Coyle* (1867), 55 Pa. 396-402; *Durkee v. Railroad Co.* (1886), 69 Cal. 533; *Lambert v. People* (1874), 29 Mich. 71; *Hill's Case* (1845), 2 Grat. (Va.) 594; *Jordan's Case* (1874), 25 Id. 943; *Harriman v. Stowe* (1874), 57 Mo. 93; *Entwhistle v. Feighner* (1875), 60 Id. 214; *Elkins v. McKean* (1875), 79 Pa. 501; *Hart v. Powell* (1855), 18 Ga. 635; *Driscoll v. People* (1882), 47 Mich. 413; *Casey v. Railroad Co.* (1879), 78 N. Y. 518; *McLeod v. Ginther* (1882), 80 Ky. 399; 1 Whart. Ev. §§ 258-267. Any other rule would, in many instances, operate to defeat the accomplishment of justice, by excluding evidence of the most trustworthy character. While some of the cases cited above carry the doctrine to its extremest length, they all illustrate and apply the general principles consistent with the conclusions we have heretofore

enunciated. The declarations under consideration were made within not to exceed two minutes of the occurrence while the declarant remained in the presence of the train, and the alleged defective machinery which was instrumental in producing his hurt, and before he had been removed from the spot where he received his fatal injury. The surrounding circumstances, in the presence of which the declarations were uttered, were therefore silent witnesses in corroboration of his statement. This, taken in connection with the condition of the decedent, who was suffering under the shock of an injury from which he died in about six hours afterwards, necessarily excludes the idea of calculation or ability to manufacture evidence for future purposes. The court committed no error in admitting the evidence.

There are a number of incidental questions of minor importance presented and discussed by counsel, but, so far as they are material to the case as we have felt constrained to consider it, they have all been disposed of by what has preceded.

Without entering upon a detailed examination of the evidence which tends to support the verdict, we content ourselves with saying that, while some of the criticisms of counsel seem plausible, and carry with them much force, we are nevertheless constrained to hold, since there was some evidence which the court and jury, whose duty it was to judge of its weight and credibility, accepted as sufficient, that the judgment cannot now be disturbed.

The judgment is therefore affirmed, with costs.

Injury while Travelling. There is a line of cases, which hold, that, if an injury is sustained by a traveller on Sunday, by reason of any defect in the highway, or, while travelling upon a railroad or boat, by reason of the negligence of the carriers, no recovery can be had.

The earliest case in Massachusetts upon the question under discussion, is *Bosworth v. Swansey* (1845), 10 Met. 363, where the town was held not liable, upon the ground that the unlawful act of the plaintiff contributed to the

accident; and unless he could show himself to be within one of the exceptions, he could not recover. This case has been followed by numerous decisions, that such an offender contributes to his own injury, and also, that, being himself in the commission of a crime at the time of receiving the injury complained of, he cannot recover: *Lyon v. Desotell* (1878), 124 Mass. 387; *Davis v. Somerville* (1880), 128 Id. 594; *White v. Lang* (1880), 128 Id. 598. It is always a good defence that the travelling is unlawful: *Jones v.*

Andover (1865), 10 Allen 18. In this case, it was held to be no excuse in a servant, to travel on Sunday to supply fresh meat for marketmen whom his master had agreed to supply therewith, although he could not do this, in addition to his other work, on Monday morning, by reason of the extra work entailed on him by his master's sickness. This doctrine was carried to an extreme in *Cox v. Cook* (1867), 14 Allen 165, where it was held, that where one travelling on Sunday, stopped at a hotel, leaving his horse, wagon and buffalo robe in the charge of the landlord's servant, and remained over night, and on Monday morning the robe could not be found, the landlord was not liable for its loss; on the ground that the travelling was illegal. Where one was sailing for pleasure, in his yacht, on Sunday, and was negligently run over by a steamboat, it was held that he could not recover the damages caused thereby, unless the collision was caused by the wantonness and malice of those in charge of the steamboat: *Wallace v. Merrimack River Nav., etc., Co.* (1883), 134 Mass. 95.

[The exceptional cases are where the act of travelling came within the allowance of the statute, as a work of necessity or charity. Such was *Doyle v. L. & B. R. R. Co.* (1875), 118 Mass. 195, where a person was on his way to see if a sick friend needed assistance. This case was affirmed in *Cronan v. Boston* (1884), 136 Id. 384, where an invalid sister was visited. *Barker v. Worcester* (1885), 139 Id. 74, (affirming *Hamilton v. Boston* (1867), 14 Allen 475), was a case where a walk for exercise was taken. So, *Gorman v. Lowell* (1875), 117 Id. 65, where a mother was proceeding to purchase medicine for a sick child.

The Massachusetts Laws provide (Pub. Stat. 1882, ch. 98)—§ 3. Whoever travels on the Lord's day, except from

necessity or charity, shall be punished by fine, not exceeding ten dollars for each offence. But the provisions of this section shall not constitute a defence to an action against a common carrier of passengers for a tort or injury suffered by a person so travelling. Which was afterwards restricted, by Stat. of 1884, c. 37, § 1, so as not to "constitute a defence to an action for a tort or injury suffered by a person on that day."]

In Vermont, it was held that a town was not liable for an injury sustained by a defect in the highway, by one who was unlawfully travelling: *Johnson v. Town of Warburgh* (1874), 47 Vt. 28; S. C., 14 AMERICAN LAW REGISTER 547, and note. The statute forbade travelling on Sunday. The case was one of first impression in that State, and was considered at length; and although the same conclusion was arrived at as in Maine and Massachusetts, the decision was put upon a different ground. The ground of the decision was, not that the plaintiff's illegal act of travelling contributed to the happening of the accident, and for that reason deprived him of the right of recovery, nor the fact that he was engaged in an unlawful act at the time he received the injury; but that the town was under no obligation to furnish him a safe highway for illegal travelling, so that he might safely violate the law. Speaking of the first two grounds assigned by some courts as a bar to a recovery, the Court said: "It is difficult to maintain that the traveller's illegal act in such cases contributed to the happening of the accident. The insufficiency of the highway remaining the same, and the traveller being at the place of the insufficiency under the same circumstances on any other day of the week, the same accident and injury would have befallen him. A contributory cause is one which, under the same circumstances, would always be an ele-

ment aiding in the production of the accident. The fact that the traveller is unlawfully at the place of the accident, does not contribute to the overturn of his carriage or to the production of the accident. * * * * Neither, as I think, can the fact that the party receiving the injury was, at the time of the injury, engaged in an unlawful act, deprive him of the right of recovery. If the plaintiff, at the time of the injury, had been profaning the name of the Deity, he would have been engaged in an unlawful act; but no one would hold that such an act would bar him from recovering of the town, if it were otherwise liable, for the injury sustained. The town could not relieve itself from the consequence of its own wrong or neglect, by alleging the illegal act of the plaintiff. Punishments are provided for all unlawful acts, but their administration is not committed to the discretion of towns; neither has a town the right to add to the prescribed penalty, the injuries resulting from its own wrongful act or neglect." * * * * "While I am quite ready to yield my assent to the reasoning of the learned judge who delivered the opinion in the case last cited," *Sutton v. Wauwatosa* (1871), 29 Wis. 21, "I am not so well satisfied that the opinion meets the real point raised for decision. As heretofore remarked, the question is not, is the plaintiff barred from recovering for injuries through the insufficiency of a highway, and which he would otherwise be entitled to recover, because he was, at the time he received the injuries, engaged in an unlawful act, but, was the town under a legal liability to furnish him a safe highway to travel on, at a time when he was by law forbidden to travel on it? * * * * All persons were forbidden to use them on the Sabbath, except for certain purposes. The statute limiting their use, furnishes the measure of the duty and liability imposed. In

other words, the duty and liability imposed are co-extensive with the purposes for which persons can legitimately use the highways, and no greater. A statute which should forbid the use of highways for certain purposes, or on certain days, or in a certain manner, would limit the duty and liability of towns in regard thereto." * * * *

[So, in *Holcomb et ux. v. Danby* (1879), 51 Vt. 428, PIERPOINT, C. J., said: "It has been repeatedly held in this State, that if a party sustain an injury, by reason of an insufficiency in the highway, while such party is travelling in violation of the statute, he cannot recover of the town for such injury. The facts in this case not only fail to show a necessity for the plaintiff's travelling on the Sabbath, but show affirmatively that there was no such necessity existing." Hence, where a parent was injured on the Sabbath by a defect in the highway, he was allowed to recover on proof of his travel being to visit his children; this was not unlawful, as the children were properly away from home: *McClary v. Lowell*, (1871), 44 Vt. 116.]

[In Maine, the statute is substantially the same as in Massachusetts, and in *O'Connell v. Lewiston* (1876), 65 Me. 34, the court held that a young lady, who, on the Lord's day, walks with her cousin three-fourths of a mile, simply for exercise in the open air, did not travel in violation of the statute, and could recover for an injury suffered through a defect in the highway. The court say (VIRGIN, J., delivering the opinion): "Can a person recover for an injury received through a defect in a way, while travelling in violation of the Lord's day statute?" This question has been repeatedly decided in the negative in this and several other States, while other courts of acknowledged learning and ability have arrived at the opposite conclusion. * * * * Before the separa-

tion, the laws of Massachusetts were our laws. * * * This decision has the authority of the court in Massachusetts, after a complete review and thorough analysis of the statutes: *Hamilton v. Boston* (1867), 14 Allen 475." This decision was followed in *Davidson v. Portland* (1879), 69 Me. 116, where the plaintiff was injured during a walk for recreation only. It is the fact of travelling, and not the manner, which is prohibited: *Cratly v. City of Bangor* (1870), 57 Me. 423. And no distinction is made between travelling in town and from town to town: *Tillock v. Webb* (1868), 56 Me. 100.]

Recovery for injury sustained on highway. But there are cases that hold an opposite view. Thus, where the plaintiff was driving his cattle to market on Sunday, in violation of a statute, and they were injured by the breaking down of a defective bridge, which the defendant town was bound to maintain, it was held that his illegal action did not prevent a recovery, upon proof of the defendant's negligence in the construction and maintaining of such bridge: *Sutton v. Town of Wauwatosa, supra*. The Court said: "The cases may be summed up and the result stated, generally, to be the affirmance of two very just and plain principles of law, as applicable to civil actions of this nature, namely: first, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act complained of; and, secondly, that the fault, want of due care, or negligence on the part of the plaintiff, which precludes a recovery for the injury complained of, as contributory to it, must be some act or conduct of the plaintiff having the rela-

tion to that injury, of a cause to the effect produced by it. * * * Under the operation of the first principle, the defendant cannot exonerate himself or claim immunity from the consequence of his own tortious act, voluntarily or negligently done to the injury of the plaintiff, on the ground that the plaintiff has been guilty of some other and independent wrong or violation of law. Wrongs or offences cannot be set off against each other in this way." Id. 26. "But we should work a confusion of relations, and lend a very doubtful assistance to morality," say the Court in *Mohney v. Cook* (1855), 26 Pa. 342. "if we should allow one offender against the law to the injury of another, to set off against the plaintiff that he too is a public offender. Himself guilty of a wrong, not dependent on, nor caused by that charged against the plaintiff, but arising from his own voluntary act, or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the State, and thus to impose upon him a penalty many times greater than what those laws prescribe."

"And as to the other principle, that the act or conduct of the plaintiff, which can be imputed to him as a fault, want of due care or negligence on his part contributing to the injury, must have some connection with the injury, as cause to effect, this also seems too clear to require thought or elaboration.

"All other conditions and circumstances remaining the same, the same accident or injury would have happened on any other day as well. The same natural causes would have produced the same result on any other day, and the time of the accident or injury, or that it was on Sunday, is wholly immaterial so far as the cause of it or the question of contributory negligence is concerned. In that respect, it would

be wholly immaterial that the traveller was within the exception of the statute, and travelling on an errand of necessity or charity, and so was lawfully upon the highway": *Sutton v. Wauwatosa*, *supra*. To same effect is *Alexander v. Oshkosh* (1873), 33 Wis. 277; *McArthur v. Green Bay and Mississippi Canal Co.* (1874), 34 Id. 139, (a boat unlawfully passing through a canal lock); *Piats v. Cohoes* (1881), 24 Hun (N. Y.) 101; s. c. (1882) 89 N. Y. 219; *Opsahl v. Judd* (1883), 30 Minn. 126; *Knowlton v. Milwaukee City* (1884), 59 Wis. 278; *Sewell v. Webster* (1880), 59 N. H. 586; *Wentworth v. Jefferson* (1880), 60 Id. 158; *Black v. Lewiston*, S. Ct. Idaho, 1887; *Sharp v. T'p. of Evergreen*, S. Ct. Mich. 1887; *Association v. Wood*, S. Ct. Miss. 1887. So, in New Hampshire, one going on a social visit, and receiving an injury from a defect in a highway, was allowed to recover: *Corey v. Bath*, (1857) 35 N. H. 531. This was probably upon the ground that it was not to the disturbance of others: see *Dutton v. Weare* (1845), 17 N. H. 34.

In Rhode Island, an inhabitant of that State brought an action against another inhabitant of the same State, for an injury sustained in Massachusetts by the reckless driving of the latter. It was decided that the action could be maintained by the plaintiff, without showing that he was travelling from necessity. The Court also further held that the defendant, having committed an unlawful act, could not set up in justification of his act that the plaintiff was also violating the statute. From the reported decision of the case, it seems that the Court went outside the record. The Massachusetts statute was not introduced in evidence, yet the Court pass upon and comment upon its provisions, citing several decisions from that State. The

Court also point out the fact that the action is not against a town for an injury caused by a defect in the highway, but against a private individual; but if it was against a town, the conclusion might possibly be different: *Baldwin v. Barney* (1879), 12 R. I. 392. Such an intimation was made in Pennsylvania: *Mohney v. Cook*, *supra*. In Massachusetts, this distinction is deemed unimportant.

In 1859, this question came before the Supreme Court of the United States: A steamboat, illegally running on Sunday, came in contact with piling unlawfully left in navigable waters and was damaged. In a suit against the railroad company for unlawfully leaving them there, the question was raised whether the owners of the boat could recover, since it was unlawful to run it upon that day. The Court held that that fact was no impediment to a recovery, and said: "The law relating to the observance of Sunday, defines a duty of a citizen to the State, and to the State only. For a breach of this duty, he is liable to the fine or penalty imposed by the statute, and nothing more. Courts of justice have no power to add to this penalty, the loss of a ship, by the tortious conduct of another, against whom the owner has committed no offense." *Philadelphia, etc. R. R. Co. v. Philadelphia, etc. Steamboat Co.* (1859), 23 How. (64 U. S.) 209. To same effect is *The Powhatan Steamboat Co v. Appomattox R. R. Co.* (1860), 24 Id. (65 U. S.) 247.

Injury by carrier on Sunday. There are two lines of cases, touching the liability of common carriers for an injury resulting from the carelessness to passengers or freight, carried by them on Sunday, at the solicitation of the passenger or owner. In Massachusetts, the cases deny a recovery by the injured party: *Stanton v. Metropolitan R. R. Co.* (1867), 14 Allen, 485; *Rei-*

tal v. Middlesex R. R. Co. (1872), 109 Mass. 398. These cases are decided upon the ground that the statute expressly prohibited travelling on Sunday, unless from necessity or for some charitable design, or to attend divine services; and the traveller, being in the very act of violating the law at the time the accident occurred, cannot recover for that reason. In *Feital v. Middlesex R. R. Co.* the plaintiff was injured while travelling on the railroad to attend a spiritualist meeting, and the question was left to the jury whether the party was on his way to the meeting for the honest purpose of divine worship and religious instruction. However, in such a case, no inquiry concerning the character of the services can be raised, beyond the question stated. This is a country where religious opinion is free, and entire religious equality is the rule of the law: See Cooley on Torts, 152. For a very strong case, where travelling was held not to be a necessity, see *Bucher v. Fitchburg R. R.* (1881), 131 Mass. 156.

Recovery allowed. But the Massachusetts cases are not in accord with the great weight of authority. In New York, one Carroll, on Sunday, paid his fare and took passage on a ferry-boat running in connection with a railroad. While he was on board the boat, the boiler exploded and injured him. The immediate cause of the explosion was too great a pressure of steam; the boiler was old, and, for that reason, negligence was attributable to the defendant and its servants for carrying so high a pressure. But a supplemental finding was made, that the crack in the boiler (which was the cause of the explosion), was a latent one, the existence of which was not known to the defendant, nor could it have been discovered by the exercise of the highest skill, foresight and care, or by any test

known and practiced by experts in the business of making, maintaining or managing steam boilers. It was contended that the plaintiff could not recover, because he was travelling in direct violation of the law. But the court refused to sustain this objection to his recovery, and judgment was entered in his favor. It was also urged that the contract, if for transportation, was illegal, and the courts would not enforce it, the defendant being under no obligation to carry it out; but this objection was also overruled: *Carroll v. Staten Island R. R. Co.* (1874) 58 N. Y. 126; S. C. (1873) 65 Barb. 32. In the opinion, the Court assumes and finds that the explosion resulted from the negligence of the defendant; and that the plaintiff's cause of action had its essential basis in the contract, of force on the one side, and the undertaking to carry on the other. It also found that the plaintiff was travelling in violation of the statute; but that the defendant was lawfully running its ferry-boat, since it is a necessity that such means of conveyances should ply on Sunday in densely populated districts. The defendant was not able to distinguish, nor was it bound to, between those lawfully travelling on that day and those illegally; and for that reason it could compel the plaintiff, by suit, to pay the passage money, if he had procured the passage on credit. The contract of carriage was, therefore, legal; although, possibly, the plaintiff could not have enforced it in his own behalf. It was held that the gravamen of the action was the breach of the duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight could go, the persons it undertook to carry; which duty existed independently of contract. Even though no contract existed, and the undertaking was gratuitous, the obligation was the same. "The law

raises the duty out of regard for human life, and for the purposes of securing the utmost vigilance by carriers, in protecting those who have committed themselves to their hands:" See *Philadelphia, etc. R. R. Co. v. Derby* (1852), 14 How. (55 U. S.) 483, where GRIER, J., said: "This duty does not result alone from the consideration paid for the service. It is imposed by law even when the service is gratuitous:" See *Bretherton v. Wood* (1821), 3 B. & B. 54; *Allen v. Sewell* (1829), 2 Wend. (N. Y.) 327; *Bank of Orange v. Brown* (1829), 3 Id. 158; *Steamboat v. King* (1853), 16 How. (57 U. S.) 469; *Nolton v. Western R. R. Co.*, 15 N. Y. 339; *Farwell v. Boston R. R. Co.* (1842), 4 Met. (Mass.) 49. The liability of the carrier is the same, whether the action is brought upon the contract or upon the duty, and the evidence requisite to sustain the action in either form, is substantially the same, and when there is an actual contract to carry, it is properly said that the liability, in an action founded upon the public duty, is co-extensive with the liability on the contract." For this reason the action was not within the principle which forbids a recovery on a contract made in respect to a matter prohibited by law; or which requires proof of an illegal contract to support it.

The Court further said: "If, conceding the liability of the defendant, had the injury occurred on some other day, a recovery is denied in this action, it must be on the ground that to allow it would contravene the general policy of the statute prohibiting travel on that day; and that the duty which the law in general imposes upon carriers, to carry safely, does not exist in respect to wrongdoers who are travelling in violation of the statute. It is certainly a startling proposition, that the thousands and tens of thousands of persons who travel on

business or for pleasure on Sunday, are at the mercy of incompetent or careless engineers and servants, and that there is no remedy for loss of life or limb resulting from their negligence. Can it be said that the object of the statute would be promoted by such a rule? I think that this cannot be affirmed, and at least, that courts cannot say that unlawful travelling would be thereby prevented or even discouraged. Those who travel in public conveyances on Sunday do not consider in advance whether the carrier will be liable if they are injured through his negligence." This case was approved in *Wood v. Erie W. R. Co.* (1878), 72 N. Y. 196—201; and in *Platz v. Cohoes* (1882), 89 Id. 219. In the latter case, the cases of *Johnson v. Warburgh*, *supra*; *Holcomb v. Danby*, *supra*; *Bosworth v. Swansey*, *supra*, and *Jones v. Andover*, *supra*, are expressly disapproved.

In Ohio, travelling is not "sporting" within the meaning of the statute: *Nagle v. Brown* (1881), 37 Ohio St. 7. Other cases allow for a recovery when the injury is incurred on Sunday, notwithstanding the violation of the statute: *The Gregory* (1868), 2 Benedict (U. S. C. Ct., S. D. N. Y.), 226; *Strickler v. Hough* (1855), 1 Pitts. Rep. (Pa.), 239; *Landers v. Staten Island R. R. Co.* (1872), 13 Abb. Pr. N. S. (N. Y.) 338. As, where the stream was obstructed: *Mohney v. Cook*, *supra*, reversing S. C. 3 Pitts. L. J. (Pa.) 140.

A company provided a canal for the passage of boats. It was held that all persons complying with lawful requirements, had a right to navigate it on Sunday, in case of necessity; and a regulation that "no boat will be allowed to pass the lock on Sunday, without a written permit from the Superintendent or his assistant, and this permit will not be granted unless in case of actual necessity," was unreasonable and void;

(1) because it required, in cases where such navigation on Sunday was necessary and lawful, that such permit be obtained of an officer, who may not be accessible; (2) because the boat-owner has the right to determine for himself the question of necessity for Sunday navigation, subject only to his liability under the statute. Although the rowing of the boat was illegal, yet its owner was allowed to recover the damages he sustained by reason of the canal company's neglect to repair: *McArthur v. Green Bay & Miss. Canal Co.* (1874), 34 Wis. 139. So, power given to a canal company to revoke by-laws for the government of the company, for the good and orderly using of the navigation, and of warehouses, wharves, and for the well-governing of the bargemen, does not authorize them to close the canal on Sundays by a chain suspended across it, and a by-law for so closing the canal on Sundays is illegal and void: *Calder & Heble Navigation Co. v. Pilling* (1845), 14 M. & W. 75; 9 Jur. 377; 14 L. J. Exch. 223. So, where a railroad company receives goods to ship on Sunday, and stores them on that day, it is bound by the same degree of diligence as if they had been received and stored on a week day. Its duty and obligation are the same: *Powhatan Steamboat Co. v. Appomattox R. R. Co.*, *supra*. At an early day, travelling in Pennsylvania on Sunday was not forbidden: *Jones v. Hughes* (1819), 5 S. & R. 298.

Injury by dog while travelling. Where the plaintiff was unlawfully travelling along the highway on Sunday, and the defendant's dog ran out and bit him, inflicting a serious injury, it was held that the plaintiff could recover damages for the injury he had sustained, and the fact that he was unlawfully travelling could not defeat his cause of action. His travelling was regarded as only an incident of the

injury, and not as a contributory cause, and the fact that he was unlawfully travelling on that day could not affect him: *White v. Lang* (1880), 128 Mass. 598. So, a like decision was made in another State, where a dog frightened the horses of one travelling on Sunday: *Schmid v. Humphrey* (1878), 48 Iowa 652.

Injury while performing labor on Sunday. If one is injured on Sunday by the negligence of another, while the injured person is unlawfully engaged in common labor, it has been held that he could recover the damages he had sustained. Thus, hauling a vessel into its berth on Sunday is an illegal act in Massachusetts; yet, in the Federal courts, it was held that the person sustaining an injury while thus engaged was not prevented from recovering his damages from that fact alone: *Sawyer v. Oakman* (1870), 7 Blatchf. (U. S. C. Ct., S. D. N. Y.) 290; s. c., 1 Lowell 134. So, one unlawfully engaged in a game on Sunday, may recover damages for any injury he sustains while so engaged, through the negligence of another: *Etchberry v. Levielle* (1858), 2 Hilt. (N. Y.) 40. But in Massachusetts, where one passing, on Sunday, by a mill where workingmen were engaged in cleaning out the wheel-pit, and he offered his assistance voluntarily, which was accepted; and while so engaged he was injured, it was held that he could not recover, because he was engaged in an unlawful undertaking; and the mere fact that if the wheel-pit was not cleaned out on a Sunday, the mill would lie idle on a week day and a large number of men lose their day's work, was not deemed sufficient to authorize the work as one of necessity: *McGrath v. Merwin* (1873), 112 Mass. 467. [This case was said to be decisive of *Day v. Highland Street Ry. Co.* (1883), 135 Id. 113, where a street-car conductor was injured, while on the

side step of his open car. This latter case in turn ruled *Read v. B. & A. R. R. Co.* (1885), 140 Id. 199, where the engineer of a live stock train was injured on a Sunday.] The opposite ruling was made in *Johnson v. Missouri, etc., R. R. Co.* (1886), 18 Neb. 690; *Louisville, etc., R. R. Co. v. Frawley* (1886), 110 Ind. 18; and in the principal case, *supra*.

Degree of care. To escape liability, on account of negligence, the person violating the Sunday law is not held to any greater degree of diligence than if he were performing the same act on a week day. This is the case of a common carrier unlawfully carrying passengers and goods on that day: *Tingle v. C., B. & Q. R. R. Co.* (1882), 60 Iowa 333.

Frightening horses. In Pennsylvania, it was held that the owner of a horse, frightened by articles carelessly left in the highway, on Sunday, had the same remedies, in case of the horse running away and injuring itself, as if the injury had occurred while travelling on a secular day: *Piollet v. Summers* (1884), 24 AMERICAN LAW REGISTER 235; s.c., 15 W. N. C. (Pa.) 241.

Injuries to hired horses. The hiring of horses on Sundays by liverymen, and others, has given rise to a number of cases. The cases cited are all instances where the horse let has been injured by immoderate driving, or by torturous conduct. In one or two instances, the injury was inflicted by a third person, whom it was sought to hold liable. In an early case, in New York, an action was brought for an injury inflicted upon a horse let on Sunday, and it was held that it could be maintained; that the action was not on the contract of letting, but for damages for a wrong done: *Harrison v. Marshall* (1855), 4 E. D. Smith (N. Y.) 271. In a subsequent case, the defendant, on Sunday, hired a team of horses, and negligently per-

mitted them to run away, whereby the team and wagon were damaged; and it was held that an action was maintainable for the damages sustained; but, in both cases, it was expressly stated, that no recovery could be had for the price agreed upon for the use of the horses. It was held that the improper conduct of the defendants was not necessarily or legitimately connected with the contract of hiring; that the owner did not forfeit or become divested of his right to the property by the delivery under it; that he had a right to a return of it, and if it was retained after a demand, he had a right of action for its recovery or its value; that there was no reason or principle why he should not be compensated for its deterioration or any damage to it by reason of the fault of the party to whom it was hired: and that such liability did not rise from the contract, but from a breach of duty in violation of the plaintiff's rights, wholly irrespective of the contract: *Nodine v. Doherty* (1866), 46 Barb. 59; s.c., 5 AMERICAN LAW REGISTER 346. Other cases have been decided in the same way, in New York: *Bertholf v. O'Reilly* (1876), 8 Hun, 16; s.c. (1878), 74 N. Y. 509.

In other States, the same result has been arrived at: that the hiring was void, but a recovery could be had for the injury inflicted, and that the commission of one wrong did not authorize the commission of another, nor release the other wrong doer from legal responsibility: *Steward v. Davis* (1876), 31 Ark. 518; *Woodman v. Hubbard* (1852), 25 N. H. 67; *Berrill v. Gibbs* (1843), 1 Pa. L. J. 313; s.c. (1843), 2 Id. 296. And in an early Connecticut case, it was held that the letting of a carriage for the conveyance of persons on Sunday, from a belief that it was to be used in a case of necessity or charity, though no such case in fact existed, was not an offence: *Myers v. State* (1816), 1 Conn.

502; see *Morton v. Gloster* (1859), 46 Me. 520.

Frost v. Plumb (1873), 40 Conn. 111; S.C., 13 AMERICAN LAW REGISTER 537, is one of the leading cases upon this subject. The defendant hired a horse of the plaintiff to drive from Waterbury to Southington on Sunday. He drove, or permitted others to drive, the horse some ten miles beyond Southington. The weather was excessively hot, and the extra distance, coupled with immoderate driving, caused the horse's death. The plaintiff brought an action of trover and case joined, to recover the value of the horse. The Superior Court held that the action could not be maintained, but the Supreme Court held that it could, and reversed the lower court's decision. The Court stated the rule governing such cases as follows: "The plaintiff cannot recover whenever it is necessary for him to prove *as a part of his cause of action*, his own illegal contract, or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important, even as explanatory of other facts in the case, he may recover. It is sufficient, if his cause of action is not essentially founded upon something which is illegal. If it is, whatever may be the form of the action, he cannot recover." Applying the rule laid down by it, the Court said, it was only necessary for the plaintiff to prove his own title to the property, and a conversion by the defendant. The destruction of the horse was a conversion. Of this there can be no doubt: see *Kennet v. Robinson* (1829), 2 J. J. Marsh. (Ky.) 84; *Maguyer v. Hawthorn* (1835), 2 Harr. (Del.) 71; *Cobb v. Wallace* (1868), 5 Coldw. (Tenn.) 539. And proof, that the injury which caused his death, occurred while being

driven without the consent of the owner, shows a complete cause of action without any reference to an illegal act. The illegal letting may or may not appear. If it does, it simply explains the defendant's possession, and proves that it was by the owner's permission, or at least for a certain purpose. It may give the defendant an opportunity to injure the horse, but it does not cause the injury; nor does it not cause the injury; nor does it contribute to it in such a sense as to make the plaintiff a party to the wrongful act. If it does not appear, before the defendant can avail himself of it as a defence, it becomes necessary for him to prove the illegal contract to which he was a party, and his own illegal conduct in travelling upon the Sabbath. But he can no more avail himself of that as a defence than the plaintiff can as a cause of action. Either party, whose success depends upon proving his own violation of law, must fail.

In *Gregg v. Wyman* (1849), 4 Cush. (Mass.) 322, it was decided, that if the horse was injured by immoderate driving, there could be no recovery. So, in *Way v. Foster* (1861), 1 Allen (Mass.) 408, which was a parallel case to *Frost v. Plumb*, *supra*, the same ruling was held. But in *Hall v. Corcoran* (1871), 107 Mass. 251, the ruling of the two former cases was departed from. That was a case where a horse was let, to be driven to a particular place, and was driven by the hirer to a different place, and, by hard usage, injured. It was held that an action of tort could be maintained for the conversion. The Court said: "It therefore appears to us to be clear, upon principle and authority, that an action of tort for the conversion of the horse, by driving it beyond the place agreed in the illegal contract of letting and hiring, is not founded on that contract. And we think it is equally clear, that

that contract need not be shown by the plaintiff, and forms no part of his cause of action." From a subsequent case, it would seem that the courts of this State had receded entirely from the ground assumed in the earlier cases; and that a recovery would be allowed, where the horse was injured by immoderate driving in going only to the place for which it was let on Sunday. Such is the view taken of the Massachusetts cases in *Frost v. Plumb*, *supra*, and such, also, in the rule announced in that case. In *Lyons v. Desotelle* (1878), 124 Mass. 387, the plaintiff was allowed to recover for an injury to his wagon and horse, sustained at the hands of a wrong doer, while hitched in a city in violation of a city ordinance: see *Horner v. Thwing* (1826), 3 Pick. (Mass.) 492. Such is the rule in Michigan: *Fisher v. Kyle* (1873), 27 Mich. 454; see Judge Redfield's note to *Johnson v. Trasburgh or Warburgh* (1875), 14 AMERICAN LAW REGISTER 553. So, in Maine, if the hirer goes beyond the place for which he engaged the horse, and the horse is injured by his tortious conduct: *Morton v. Gloster* (1859), 46 Me. 520. So, he is liable, if he employed the horse on Sunday, and retained it until after sunset (when Sunday ends), and the horse is then injured by his tortious act: *Bryant v. Biddleford* (1855), 39 Me. 193.

No recovery. Notwithstanding the decisions from Maine already cited, it has been held that if the injury to the horse occurs while going to or returning from the place for which it was engaged, or during the time for which it was engaged, or for the drive, no recovery can be maintained: *Parker v. Latner* (1872), 60 Me. 528; *Morton v. Gloster*, *supra*. So, in Rhode Island, where the defendant drove beyond the place for which he had engaged the horse, it was held that proof of the contract, which was illegal, was

necessary to establish the conversion, and that the plaintiff, therefore, could not recover: *Whelden v. Chappel* (1865), 8 R. I. 230. And, in a subsequent case, where the horse was driven on a different journey from that for which it was employed, and injured, the same Court held that it was necessary to show the illegal contract in order to recover, and for that reason no recovery could be had; for, as soon as that contract was introduced, the action must fail. Nor was it sufficient for the plaintiff to merely prove that he did not let his horse for the particular journey defendant went; but he must also prove the contract made with him, and prove its exact terms. Nor was the plaintiff's position tenable, that the defendant could not show the illegal contract to defeat the cause of action. The Court distinguishes the case in question from the cases of *Morton v. Gloster*, *supra*; *Nodine v. Doherty*, *supra*, and *Frost v. Plumb*, *supra*, by showing that, in those cases, it was not essential to the plaintiff's recovery to show the illegal contract, but that the acts of conversion were distinct from, and capable of complete proof without a suggestion of, the contract. The Court disapproved of the reasoning in *Hall v. Corcoran*, *supra*, and in *Woodman v. Hubbard*, *supra*. But, in alluding to a statement made in the latter case, the Court said that it was ready to admit, that, if it was necessary for the plaintiff to bring an action of replevin to obtain possession of his horse so let on Sunday, after demand made, he could maintain the action, or even after a sale or destruction of the horse by the defendant, for the conversion would be "wholly distinct from, and independent of, the contract:" *Smith v. Rollins* (1877), 11 R. I. 464; see, however, *Baldwin v. Barney* (1879), 12 Id. 392. Upon the whole, it seems, that this case savors so much of fine distinctions that it is calculated

to favor immoral conduct, rather than to advance morality. It is such distinctions as these that bring the law into disrepute; and they are born of the distinctions of the early common law.

Aggravating damages. Because one committed a tort on Sunday, while engaged in an unlawful work, for that reason the damages cannot be aggravated: *Sibila v. Bakney* (1878), 34 Ohio St. 399. So, if a railroad company unlawfully runs its trains on Sunday, and by the running, an injury is inflicted, the damages for that reason are not aggravated: *Tingle v. C. B. & Q. R. R. Co.*, *supra*.

Comments. The great weight of the authorities is against the position assumed by the Massachusetts, Maine and Vermont Courts. In fact, those courts are often inconsistent in their own individual decisions; for, in many cases, a recovery is allowed when at the time of the injury the complaining person was engaged in a violation of the law: See *Baker v. Portland* (1870), 58 Me. 199, and *McCarthy v. Portland* (1878), 67 Id. 167, as instan-

ces of this statement, comparing those cases with the ones already cited. An author of high standing, after examining both the English and American cases upon this and like subjects, says: "The fact that a party injured was at the time violating the law, does not put him out of the protection of the law; he is never put, by the law, at the mercy of others. If he is negligently injured in the highway, he may have redress, notwithstanding at the time he was on the wrong side of the way, provided that fact did not contribute to the injury. So, a party who engages in an unlawful game, may recover for an injury suffered while playing it, and so may one who participates in a race and is wilfully run down by his competitor." Cooley on Torts, 157. A violation of the Sunday law is no greater crime than the commission of any offense of the same degree, and there is no reason why a greater punishment should be visited upon an offender against the Sunday law than upon one violating any other law.

W. W. THORNTON.
Crawfordsville, Ind.

Court of Chancery of New Jersey.

HUTCHINS' EXECUTOR *v.* GEORGE, *ET AL.*

A bequest for the distribution of books, in which the author describes the system by which the land owners of the country hold the title to their lands, as robbery, is not such a charity as the courts will enforce.

A bequest of a fund to perpetuate an useful library is valid, even if the library is composed of a certain class of books, provided they will enlighten and improve mankind.

Jackson v. Phillips, 14 Allen 539, dissented from.

Bill for the construction of a will.

Mr. *George A. Vroom*, for complainant.

Mr. *George T. Woodhull*, for Henry George, a defendant.

Mr. *Schuyler C. Woodhull*, for Mary Hutchins, a defendant.

Mr. *C. V. D. Joline*, for James Hutchins, a defendant.

BIRD, V. C. May 21, 1888. William S. Braddock, the executor of the last will and testament of George Hutchins, deceased, by his bill, asks for the construction of the will of the said deceased. The will first makes provision for the wife of the testator, and makes other disposition of a small amount of his property, and then, and lastly, makes the provision for the construction of which this bill filed :—

“ Lastly. All the rest and residue of my estate of any and every form, kind and description whatsoever, I hereby give, devise and bequeath, under the name of ‘ The Hutchins Fund,’ to Henry George, the well-known author of ‘ Progress and Poverty,’ his heirs, executors and administrators, in sacred trust for the express purpose of ‘ spreading the light ’ on social and political liberty and justice in these United States of America, by means of the gratuitous, wise, efficient and economically conducted distribution all over the land, of said George’s publication on the all important land question and cognate subjects, including his ‘ Progress and Poverty,’ his replies to the criticism thereon, his ‘ Problems of the Times,’ and any other of his books and pamphlets which he may think it wise and proper to gratuitously distribute in this country ; provided, first, that the said George, his heirs, executors and administrators, shall regularly furnish true annual reports of

the management and disbursements of the said 'Hutchins Fund' to the paper called 'The Irish World and the American Industrial Liberator,' or its acknowledged successor, and shall also annually mail, or otherwise send, a copy of said paper, containing such annual reports, to each of the following persons, to wit: my aforementioned wife, Mary Hutchins, now of this place; William S. Wood, now of Parker, County of Randolph, State of Indiana; and James Hutchins, now of Selma, County of Delaware and State of Indiana; and provided, second, that said George, his heirs, executors and administrators, shall cause to be inserted or printed opposite the title page of every free copy of his books distributed by means of this fund, this my solemn request, virtually, to wit: that each recipient shall read it and then circulate it among such neighbors or other persons, as in his best judgment, will make the best use of it."

The bill shows that the executor had been warned by the heirs at law, and next of kin of the said testator, that the said bequest is void, and that he will not be justified in attempting to comply with the provisions of the will respecting it. He prays, therefore, for the court to declare whether or not such gift, in trust, of the residue, is legal and valid, and whether it will be enforced in a court of equity or not; and whether, under the terms of the will, he is authorized to make sale of the real estate mentioned therein; and whether the said Mary Hutchins, the widow, is entitled to dower in the real estate; and fourth, whether or not, if the said gift to the said Henry George be declared invalid, the said testator died intestate as to the said residue, and in that case, how shall the said residue be distributed; and in case the said residuary clause be declared invalid, whether or not the said executor is authorized to sell the real estate, and if so, as to the disposition of the proceeds thereof; and whether one-third of the proceeds of the sale shall be considered as personal estate and be distributed as such.

The defendants, Mary Hutchins, the widow, and George Hutchins, one of the legatees, insist that the said residuary clause is invalid, and therefore cannot be enforced; first, they insist that it is not a charitable bequest, within the meaning of

the term as understood by all text writers and judges who ever have had occasion to pass thereupon. Much reliance is placed upon the Statute 43 Elizabeth, chapter 4, by the defendants. They urge that every adjudication, since that time, has gone upon the theory that nothing will be supported, of the character named, which is not clearly and indisputably, a charity.

It is said that this was the view presented by Chief Justice Marshall, in *Baptist Association v. Hart*, (1819,) 4 Wheat. (17 U. S.) 1, in which he says: "We have no trace in any book, of any attempt in the Court of Chancery, anterior to the statute, to enforce one of these vague bequests for charitable uses."

Notwithstanding this eminent authority, the opinion of the court in *Vidal v. Girard*, (1824,) 2 How. (43 U. S.) 126, 194, seems to establish the fact, that the Court of Chancery had such power and exercised it before the Act referred to was passed; and it is insisted that whether or not the said Statute be enforced in New Jersey, the spirit and intent thereof prevails; *Thompson v. Norris*, (1869,) 5 C. E. Green, 522. And to support this, Story's Equity, § 1155, is cited.

What is a charity? Since it often happens that definitions are framed from and for particular cases, I will not attempt defining it; but will be content with the views of others, of great experience and learning, and which are relied upon by counsel for defendants. Perry on Trusts, § 709, is cited, where the learned editor says: "Charity has obtained a significance in law, and courts do not uphold or administer trusts for particular purposes which are not charitable, within the meaning of the law." Mr. Story adds; "A bequest may, in an enlarged sense, be charitable, and not within the purview of the statute." Another authority, it is said, writes: "Such charitable bequests only as are within the letter and spirit of the statute" are sustained; citing Story, §§ 1155, 1158, 1164; *Kendall v. Granger*, (1842,) 5 Beav. 300; *Williams v. Williams*, (1853,) 8 N. Y. 547; *Brown v. Yeale*, (1791,) 7 Ves. Jun. 50, note; *Owens v. Missionary Society*, (1856,) 14 N. Y. 397, 403.

Again, it is said that all of the purposes to which any charitable bequest can be made, may be classified under those

which are ecclesiastical, educational or eleemosynary: *Atty-Gen. v. Calvert*, (1857,) 23 Beav. 258. And it is claimed that the gift which we are now considering, cannot be brought within either of these classifications; for, it is said, that in no sense does the gift in question have a tendency to benefit or to improve mankind, being in no sense a school of learning to educate mankind. The claim further is, that there must be an indubitable benefit, a tendency to humanize, to elevate and to improve mankind, before a gift of this nature can be declared valid or enforced by the courts.

It is said further that in *Brown v. Pancoast*, (1881,) 7 Stew. Eq. 321, Chancellor RUNYON said that a gift by the testator for the purpose of creating a fund, the income of which should be devoted to the purchase of books in founding a useful library, was charitable. Counsel says, with respect to this, "Incontestibly, this was a good bequest, and should be enforced;" but says: "Far different is the purpose under consideration; here the bequest is to spread light on the land question, by purchasing and distributing books written by the trustee, on that question. And it is a bequest for spreading abroad a man's theories on the question of land tenures and their abuses and cognate subjects."

A bequest, then, of a fund to perpetuate a useful library is good. The bequest under consideration, is to spread the light on the land question; in other words, on the question as to who shall hold the title to lands, or how that title shall be held, or for whose benefit. Now, if the gift to establish a library, without classification of the books, or without reference to their character (except that they be useful), would be good, certainly a gift to establish a library, to be composed of a certain class of books, or of books upon certain subjects, would be good also. Would not a gift for the purpose of founding an institution to publish the works of Newton, or of Bacon, or of Milton, or of Shakespeare, or of Edwards, or of Bancroft, or of Irving, or of McCosh, or Webster, or Marshall, be good? Incontestibly so. If not, then I do not see how we can sustain the numerous gifts to the Bible Society, within the control of various denominations of Christians, in this country. But if I am right in this, then it must follow, that a gift to circulate

any portion of these works or any one of them, would also be lawful. And look to high authority.

There can be no doubt that the circulation of one book may be the object of a testator's bounty. A testatrix provided that the residue of her estate should be applied towards the printing, publishing and propagation of the sacred writings of the late Joanna Southcote. The heir filed a bill, alleging that the gift for such purpose was either void in law, on the ground that the writings were of a blasphemous and profane character, or that the trust so declared was for the propagation of doctrines subversive to the Christian religion. It seems that Joanna Southcote taught in her books, that she was with child by the Holy Ghost, and that a second Messiah was about to be born of her body. In speaking of her, Sir JOHN ROMILLY, Master of the Rolls, said: "In the history of her life, her personal disputations and conversations with the devil, her prophecies and her intercommunings with the spiritual world, I have found much that, in my opinion, is very foolish, but nothing which is likely to make persons who read them, either immoral or irreligious." Again, he says: "I cannot say that the bequest of a testator to publish and propagate works, in support of the Christian religion, is a charitable bequest, and, at the same time, say that if another testator should select, for this purpose, some three or four authors, whose works will, in his opinion, produce that effect, such a bequest thereupon ceases to be charitable. Neither can I do so if the testator should select one single author." The bequest was sustained. *Thornton v. Howe*, (1862,) 31 Beav. 14.

If it be so that a bequest for the distribution of the works of Joanna Southcote, or of the Bible, by an institution founded for that purpose, is valid, then it is clear that a bequest for any other single and definite purpose, which will, if carried out, have a tendency to enlighten or improve mankind with respect to a given subject or theory, such gift must also be valid, as a charity, and can be enforced by the courts. It will be noted that I say to enlighten or to improve mankind. And it is not necessary that I should more particularly define the object to be had in view in every such discussion. Certainly if the purpose of the testator was to disseminate doctrines immoral in

their character, tendency or influence, they could not be called charitable, in any sense ; nor could they, in any sense, be said to elevate or improve mankind. I cannot but add that it is not the individual judgment which is to be the guide in every such case, for manifestly that may be regarded as hostile to the public welfare, by one individual, which, by another, would be deemed most useful or beneficial.

This assertion is founded upon what we are taught in all the pages of history. It is everywhere written that the efforts of enlightened individuals upon one hand, to break through the clouds of darkness and of ignorance, or to overcome oppression and resistance, have, upon the other hand, been as stoutly opposed, if not by persons equally intelligent, yet by persons enjoying the benefits and advantages which came to them from the existing condition of things, and placed them in positions of supremacy, or of happiness above their fellows. Suffice it to say that our own national history had its origin in this great truth, and gives us numerous illustrations of the inestimable value of it.

Now with these suggestions as to the law, and as to the fundamental principles which should control, let us see what it is which the testator in the case before us, desires to disseminate. A few quotations from the books which have been offered in evidence are essential, and a few will suffice ; those which been presented by counsel for the defense, I will give. Chapter I of Book 7, in the work on Progress and Poverty, the author heads with the phrase, "The injustice of private property in land." Among many of his declarations in that chapter, he says : "There is, in nature, no such thing as a fee simple in land. There is, on earth, no power which can rightfully make a grant of exclusive ownership in land. If all existing men were to unite to grant away their equal rights, they could not grant away the right of those who followed them. For what are we but tenants for a day? * * * Let the parchments be ever so many, or possession ever so long, natural justice can recognize no right, in one man, to the possession and enjoyment of land, that is not equally the right of all his fellows. Though his titles have been acquiesced in by generation after generation, to the landed estates of the Duke of Westminster, the

poorest child that is born in London, to-day, has as much right as his eldest son. Though the sovereign people of the State of New York consent to the landed possessions of the Astors, the puniest infant that comes wailing into the world in the squalidest room of the most miserable tenement house, becomes at that moment seised of an equal right with the millionaires, and it is robbed, if the right is denied. * * * The wide spreading social evils which everywhere oppress men, and, amid an advancing civilization, spring from a great primary wrong—the appropriation as the exclusive property of some men, of the land on which and from which all must live. * * * As for the deduction of a complete and exclusive individual right to land, from priority of occupation, that is, if possible, the most absurd ground on which land ownership can be defended. Priority of occupation gives exclusive and perpetual title to the surface of a globe on which, in the order of nature, countless generations succeed each other. Had the men of the last generation any better right to the use of this world, than we of this? or the men of a hundred years ago? or of a thousand years ago?"

The title of chapter 3, suggests the contents of it, namely: "Claim of land owners to compensation." "The truth is, and from this truth there can be no escape, that there is and can be no just title to exclusive possession of the soil, and that private property in land is a bold, bare, enormous wrong, like that of chattel slavery. * * * The examination, through which we have passed, has proved conclusively that private property in land cannot be justified on the ground of utility—that, on the contrary, it is the great cause to which are to be traced the poverty, misery and degradation, the social disease and political weakness, which are showing themselves so menacingly amid advancing civilization. Expediency, therefore, joins justice, in demanding that we abolish it. The land of Ireland, the land of every country, belongs to the people of that country. * * * The common right to land has everywhere been primarily recognized, and private ownership has nowhere grown up, save as the result of usurpation. * * * Historically, as ethically, private property in land is robbery. It nowhere springs from contract; it nowhere can be traced to perceptions

of justice or expediency ; it has everywhere had its birth in war and conquest, and in the selfishness, which the cunning have made, of superstition and law."

In his work on Social Problems, Henry George says : " The more we examine, the more clearly we see that public misfortunes and corruptions of government do spring from neglect or contempt of the natural rights of man. * * * The institution of public debts, like the institution of private property in land, rests upon the preposterous assumption, that one generation may bind another generation. If a man were to come to me and say : ' Here is a promissory note which your great-grandfather gave to my great-grandfather, and which you will oblige me by paying,' I would laugh at him, and tell him that if he wanted to collect his note, he had better hunt up the man who gave it ; that I had nothing to do with my great-grandfather's promises. And if he were to insist upon payment, and to call my attention to the terms of the bond, in which my great-grandfather expressly stipulated with his great-grandfather that I should pay him, I would only laugh the more, and be more certain that he was a lunatic. To such a demand, any one of us would reply in effect, ' My great-grandfather was evidently a knave or a joker, and your great-grandfather was certainly a fool, which quality you certainly have inherited, if you expect me to pay the money because my great-grandfather promised that I should do so. He might as well have given your great-grandfather a draft upon Adam, or a check upon the First National Bank of the Moon.' * * * While, as for the great national debts of the world, incurred as they have been for purposes of tyranny and war, it is impossible to see in them anything but evil. Of these great national debts, that of the United States will best bear examination ; but it is no exception."

Some observations seem to be necessary, in order to understand the full measure of the subject we are dealing with. The sentiments or expressions, which I have above recited, are leveled at the foundation of laws and customs, as they have existed for many centuries, wherever civilization has had the slightest foothold ; are leveled at principles which in all ages, where men have been at all enlightened and made progress

from barbarism, have been fostered, as among the foremost incentives to human action ; and at principles, which have, during all the period named, been regarded as the very bulwarks of freedom and stability among the nations of the earth. Indeed, in one sentence, it may be said, that nothing, excepting only the Gospel, has done so much towards lifting man from the degrading superstition and slavery of heathenism, as the possibility, by generous effort, of acquiring a certain foothold upon the soil, which, if he improves, shall be his own and shall descend as an inheritance to his posterity, or shall be disposed of according to the owner's will and pleasure. But our author, by a stroke of the pen, or an act of legislation, would sweep away every thought, or sentiment, or link, which binds individuals to locality, to home, to society, or to government, and send him adrift without rudder, or sail, or guiding star, or beacon light, or a tent to shelter, or a cabin for himself or his little ones.

Take away this inducement to labor, that is, say to the hungry, " You have no more right to plow and to sow a given tract of land than any other of the millions who tread the earth ; and if you do plow and sow and cultivate, another has the same right to reap, or if you do these things and die before you have gathered, strangers may enter and reap, and your children, for whom you have wrought, may go crying for bread ;" say to those who go a step beyond, and waste the energies of a life-time in improving the soil, in erecting comfortable dwellings and barns, that another has equal claim not only to the soil itself, but to all that has been put upon it for its adornment, and that even the distress of advanced years and the necessities of a growing household, will not protect the possessor, nor insure his posterity in a title thereto ; then indeed will the sweet, reviving, life-giving sunshine of our present civilization disappear more rapidly than did the Roman, at the appearance of the Goths and Vandals.

The laws, the customs, the institutions, amid which we have been brought up, and which have shed that influence which we regard as hallowed or sacred, upon us, have so influenced us that we cannot look at this subject in any other light than above expressed. These laws, customs and institutions may stand

upon a false foundation, and may shed a false or misleading light; but to ignore the fact of their influence, or the fact of their existence, cannot be conceived of for one moment, and much less are we inclined to reject and overthrow them, when we consider that they have been sanctioned and maintained by the judgment, the labor and the skill of the best and wisest of men, which the past generations have produced.

But the importance of the subject warrants another observation: Suppose the theories of our author should prevail, and the determination be to resolve society into its original elementary or first principles; what is to be done with the billions of dollars of improvements, which now beautify and adorn the earth? Who would be entitled to them? Could another, who had spent neither a moment of time nor a dollar in their construction, say to the Astors or the Vanderbilts, that he had an equal claim to such improvements with them? Could the tramp say to the day laborer who, by dint of industry, had procured for himself the title to a lot and erected thereon a dwelling for himself and family, that that was as much his dominion and inheritance? And if such difficulties as these were to be securely removed or overcome, and the wide world lay open before all men equally, and all the laws on the subject of titles were abolished, and it were to be considered that each man, woman and child had an equal right to the whole and to every part, with all the other millions of inhabitants, what then would the order of affairs be? Or what then would be the sequence of the first demonstration? Indeed, it may be, there would be no human effort. Perhaps, if there was no such thing as a holding, as a title, as a tenure, there would be no labor expended. The whole social system thus transformed, if not deformed, and the self-imposed edict that no one had any right to the soil under his feet, except during the momentary occupation, have we not then a picture of what would ensue, in the mighty hordes that roamed over Asia nearly 2,000 years ago?

While these suggestions show us the extent and importance of the discussion, they do not seem to terminate the discussion. I have said this question is not to be determined by the judgment of a single individual, nor of a single court, com-

posed of many individuals; but it is to be determined by the true reason or spirit of law, as it has been declared and upheld for long periods of time. And the law, as I have shown, for many centuries, has acknowledged and sustained the right of individuals, to hold title to lands, to dispose of those titles at their own will and pleasure, and upon their death, if not otherwise disposed of, said lands to descend to their heirs at law.

It is said, however, that while this is a historical fact, it is nevertheless only the semblance of a right, and has nothing to commend it, but the veneration which we pay to antiquity. It is urged that this great fallacy, like many others, is doomed to vanish before the light of true inquiry. It is also claimed that, oftentimes, the greater the wrong, the more deep-rooted and irresistible does it become; and that what has been growing for ages, and winning the admiration of men, because it fostered their greed and pampered their vices and sustained their indulgences, will take ages to remove. It is claimed that these vices and indulgences, and this greed of mankind, have imposed the fetters which now enslave and degrade the millions of earth. This, of course, is upon the theory that our habits of thought have been such, that we are at present unable to distinguish the truth from error. Nor have any of the enlightened men in former ages, been protected by their nearer approach to the point of departure, from falling under the same hallucination.

But the process of a proper mental training must be begun. The alphabet and spelling book of a new departure must be learned. This, although the work of time, it may be of ages, the beginning cannot be postponed. Illustrations, we are assured, may be had. The ignorance of the people during the feudal ages, and the hardships which they endured and submitted to, at the hands of their chiefs, although few in number, were not removed nor overcome until generation after generation had gone down in the mighty struggle for freedom from that bondage which was gross in its character, debasing in its influences, and demoralizing upon the whole body politic. Century after century were human beings held in worse bondage still, and sold like chattels in the public markets; and to remove this blight upon civilization, the discussion, although

feeble in its inception, waxed warmer and warmer, throughout the ages, until horrid war came to the front and marked an era of unexampled devastation and blood.

The brief glance, above given, shows us that the revolution contemplated, involves every moral, social, political and economical problem ; and that the only hindrance to its triumph is said to be the ignorance, prejudice or selfishness of the rulers, sages and philosophers of the present age. While it is both difficult and unpleasant to believe, that our moral capacities are so blunted or blinded as is indicated, that nothing but another deluge can regenerate mankind, yet in this undertaking we have no concern in that direction, any farther than to survey the plan designed and declared to be a mark of safety for the people, as against all social, political and economical ills. With this to guide us, I conceive the extent of our duty to be, to declare whether or not it is within the pale of the law, for the testator to undertake, by the means indicated, the work of accomplishing such a revolution.

And this brings me to the last and most serious view of this branch of the subject. Notwithstanding the practical working out of this problem, by our author and his adherents, involves our homes, and our firesides, our Church, and our State, and all the institutions established and regulated thereby, yet there is one fundamental principle that lies so hard by, and is so interwoven with all the rest, that I cannot forget nor mistrust it, nor even venture to say that it, too, is not involved in this controversy—I refer to the liberty of speech and the freedom of the press. But it is asked, how is this principle involved? I answer, much every way. Think a moment and it will appear plain. One testator says, by his bequest, circulate the Bible, another, the tract, and another, establish libraries which circulate everything that is not of an immoral tendency and much that is, which issues from the press. In many of these last institutions, doubtless, may be found books most questionable in their character, including many infidel publications of every type. This fact was admitted on the argument. These, without the slightest discrimination, have been upheld by the courts, as charitable institutions. It would be impossible upon principle, to say otherwise, for whenever the courts undertake

the work of the critic or the censor, and to declare that this or that is bad, or that this or that is good, when dealing with questions of this character, unless the book be irreligious or immoral, then indeed the system of charities which is designed to elevate mankind by the diffusion of knowledge through books, must at once begin to decline.

I am not required to say what the Court should do, in case of a bequest providing for the circulation of an infidel, or blasphemous, or immoral publication. According to the enlightened training of the present age, we cannot believe that such a case will ever arise, although the generous efforts of many, the most God-fearing, do, although unintentionally, encourage the circulation of such books, by their indiscriminate donations, establishing public libraries. Whether the courts could undertake the winnowing process, is not now material.

But the most that I can say of the books before me, is, that they are not indifferent on the subject of Christianity. It seems to be recognized throughout. I do not find anything in them of a rebellious or treasonable character, or that is directly calculated to foment public disturbances, or to incite the masses of the people to revolt; although they contain many assertions to the effect that every one has an equal right with every other one to the land; and these assertions, the author endeavors by various forms of argument to sustain and enforce, and sometimes by the use of statements couched in very strong language—yet it cannot be said, so far as I have been able to ascertain, that any other principle or doctrine is comprehended, which should induce the court to refuse to aid in enforcing the trust, except as will hereafter appear.

Now, can the Court, according to its past history and former adjudications, lay its hand upon this gift, and restrain the executor from such disposition of it, by declaring the bequest void or illegal, because it is not a charity? In my judgment, this would be contrary to the true spirit and meaning of the law, because, as I have intimated, I fear it would be aiming a blow at the liberty of speech and the freedom of discussion. This consideration is at the very threshold. The present advanced stage of civilization has no other bond so securely sealed, no other bond cemented by so many precious yet some-

times conflicting interests, no other bond made so sacred by innumerable ties, recollections and historic events, as the bond that vouchsafes to us the liberty of speech and the freedom of discussion. I am sure that the most of those who enjoy this civilization, feel too proud of the vantage ground attained by the instruments of free speech and free discussion, to lay the foundations for the surrender of them, by depriving any other one of the use of such means, when they seek to advance their views, with respect to fundamental principles which they insist would procure for us a still higher, nobler and purer civilization.

From these observations, it will appear that, upon the whole case, I am disposed to sustain the bequest in the will, and would do so, notwithstanding the clear and strong expressions, in the very learned and most able opinion, in the case of *Jackson v. Phillips* (1867), 14 Allen Mass. 539, in which it is declared, "that a trust to secure the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, to hold, manage and devise property, and all other civil rights, enjoyed by men, cannot be sustained as a charity," were it not for the exception to be referred to. The reason given in that case is, that the bequest aimed directly and exclusively at the change of the laws, and it was not for the Court to determine whether laws were wise or unwise, but simply to expound them as they stand. It was observed, "Those laws do not recognize the purpose of overthrowing them or changing them, in whole or in part, as a charitable use."

It seems to me that if this principle be followed to all its logical consequences, all donations for the spread of the Bible, and to foreign missions to aid in the accomplishment of their work, would fall under judicial condemnation; for, most clearly, the work of spreading the Gospel, as carried on by foreign missions, is successful only in proportion as it overturns and obliterates existing laws, customs, institutions and religions, whose origin is so remote as to be beyond discovery. And to avoid a consequence so disastrous, has induced me to pay no little attention to the subject matter, and to intimate, as I have, that the cause of truth, virtue and good government, can never suffer by the utmost liberality of discussion, even though the

courts, when called upon to sustain bounties as charities, do so, unless such right of discussion should be abused.

The exception to which I have adverted, had reference to what Mr. George says with respect to the claim of land owners to compensation. He says: "It is not merely a robbery in the past, it is a robbery in the present—a robbery that deprives of their birthright the infants that are coming into the world. Why should we hesitate about making short work of such a system? Because I was robbed yesterday, and the day before, and the day before that, is it any reason that I should suffer myself to be robbed to-day and to-morrow? Any reason that I should conclude that the robber has acquired a vested right to rob me?" Again, he says: "Historically, as ethically, private property in land is robbery."

Clearly, the author, in these passages, not only condemns existing laws, but denounces the fact of the secure title to land in private individuals as robbery—as a crime. It is this aspect of the case which leads me to the conclusion, that the court ought to refuse its aid in enforcing the provisions of this will. Whatever might be the rights of the individual author, in the discussion of such questions in the abstract, it certainly would not become the court to aid in the distribution of literature which denounces as robbery—as a crime—an immense proportion of the judicial determinations of the higher courts. This would not be charitable. Society has constituted courts for the purpose of assisting in the administration of the law, and in the preservation of the rights of the citizens, and of the public welfare; but I can conceive of nothing more antagonistic to such purpose than for the courts to encourage, by their decrees, the dissemination of doctrines which may educate the people to the belief, that the great body of the laws which such courts administer, concerning titles to land, have no other principle for their basis than robbery.

I have sought to overcome the view just expressed, by striving to bring the books of Mr. George within that branch of the opinion in *Jackson v. Phillips*, *supra*, which maintained that efforts to produce a change in public opinion, on the subject of slavery, by the publication of books, newspapers, speeches and lectures, was charitable, but I have not been able so to do,

for the reason given. However radical the works of Mr. George may be; however much in conflict with prevailing convictions or prejudices; I can find but the one thing in them that in any sense makes it my duty to say that the court cannot regard the bequest as charitable.

If I am correct in the foregoing view, the testator died intestate as to all of his estate not disposed of by the three first paragraphs of his will.

I will advise a decree in accordance with these views.

It will be observed that the bequest mentioned in the above case was declared not to be charitable, on the ground that the books to be circulated by the fund, denounced a large proportion of the judicial determinations of the higher courts as crimes; and that no one has the right to assert and teach that our courts habitually, as a matter of right, and under the protection of law, rob the innocent, and that a bequest which would aid in the dissemination of such views, was void, and not a legal charity, on account of its object. And yet it would seem as if the sentiment of the community were an important factor in a decision of this kind.

Prior to 1861, the courts of the slave States would not allow charitable bequests, tending to liberate slaves, stand; while courts of the Northern States were glad of the chance to help disseminate anti-slavery doctrines: see cases of *Lusk v. Lewis* (1856), 32 Miss. 297, and *Jackson v. Phillips*, *supra*, hereinafter more fully quoted.

At present, the sentiment of the community is antagonistic to Henry George's land theories, and the question of public policy was rightly decided by the learned Vice Chancellor in the case we are reviewing, and yet he tried to uphold the bequest, this question of public policy alone preventing him from so doing. The theme is hereby suggested, what charitable bequests will the courts

not enforce on account of the *object* of the charity designated by the testator. There are no end of cases where charitable bequests fail for uncertainty, because they violate statutes, and various other reasons, but the number falling within our theme is comparatively small.

What is charity in a legal sense?

In *Perry on Trusts*, § 709, it is stated that the word *charity* has obtained a signification in law, and that courts do not uphold or administer trusts for particular purposes, which are not charitable within the meaning of the law; nor trusts expressed in general words, which do not come within the legal signification of the word *charity*, and, further in the same section, he defines charitable gifts as, "gifts, where they are made to particular purposes which are charitable, within the letter and spirit of the statute, or where they are made to charity generally, if there is a trustee with power to make them definite and certain." Other writers give practically the same definitions. There should be an addition to the above, as follows: "provided that the bequest or gift is not contrary to public policy."

In the case of *Goodell v. Union Ass'n* (1878), 29 N. J. Eq. 32, it was decided that a gift to Trinity Church Sunday School, in Mount Holly, of \$1000, to be safely invested, the interest to be applied to making Christmas presents to the scholars of said school, is not a legal

charity. Why? I never could understand, but there it is.

Before taking up other cases from our State reports, let us glance at the decisions in England on this subject. In Duke's Law of Charitable Uses, it is laid down (Lond. Ed. 1805, pp. 125-130) that a gift to maintain a minister is not good, *for religion is variable*, nor for catechising, for the same reason, nor to teach dancing or fencing, because they are matters of delicacy. A gift to provide for the marriage of poor maids is good, but not to provide the wedding ring, as that is the husband's duty.

Bacon in his Abridgment, Vol. I., p. 581, defines a superstitious use as when lands, etc., are secured, etc., "for and towards the maintenance of a priest or chaplain to say mass; for the maintenance of a priest, or other man, to pray for the soul of any dead man," etc., and the king, as head of Church and State, must see that nothing is done in maintenance or propagation of a false religion.

There is quite a long line of decisions in England, declaring such bequests void: Duke's Char. Uses, p. 466. For bringing up children in Roman Catholic faith, void: *Cary v. Abbot* (1802), 7 Ves. Jun. 490. For saying masses and requiems for souls and for other purposes, void: *Heath v. Chapman* (1854), 2 Drew. 417; *Re Blundell* (1861), 30 Beav. 360. The contrary is true in Ireland: *Read v. Hodgins* (1844), 7 Ir. Eq. 17. A bequest of a prize for an essay, showing "the adequacy and sufficiency of natural theology, when so taught as a science, to constitute a true, perfect and philosophical system," was held void, as contrary to the Christian religion: *Briggs v. Hartley* (1850), 19 L. J. (N. S.) Ch. 416.

Bequest to establish an institution for teaching Jewish religion, held void, as contrary to the law of the land: *Re Bedford Charity* (1818), 2 Swanst.

501. Also, a bequest for the maintenance of an assembly for reading the Jewish law, and advancing Jewish religion, for the same reason: *Da Costa v. De Pas* (1753), 1 Amb. 228.

Gifts to aid in re-establishing the supremacy of the Pope, are contrary to public policy and void: *De Themmines v. De Bounetval* (1828), 5 Russ. 288. This same case decides that a gift to promote a religious faith contrary to the statute is void.

A trust for the political restoration of the Jews to Jerusalem, is not charitable in its nature: *Habershon v. Vardon* (1851), 4 De G. & Sm. 467.

A trust to buy and distribute such books as might have a tendency to promote the interest of virtue and religion and the happiness of mankind, not sustained as too indefinite: *Brown v. Yeall* (1791), 7 Ves. Jun. 50 n. 76.

Gifts to repair tombs, void: *Vaughan v. Thomas* (1886), 33 L. R. Ch. D. 187; *Hoare v. Osborne* (1866), 1 L. R. Eq. D. 585.

In respect to charitable trusts for printing and circulating works of a religious tendency, courts make no distinction between one sect and another, unless their tenets include doctrines adverse to the foundation of all religion or subversive to all morality, in which case the bequest will be declared void: *Thornton v. Howe, supra*. This is one of the most interesting cases on the subject to be found.

A gift to be applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, was held to be void, the words "general utility" comprehending purposes not charitable: *Kendall v. Granger* (1842), 5 Beav. 300.

Gift to ten poor clergymen, to be selected by a trustee, is not charitable: *Thomas v. Howell* (1872), 18 L. R. Eq. D. 198; *Att'y Gen. v. Baxter* (1684), 1 Vern. 248.

The most important case, and the last English case I shall mention, is *Thrupp v. Collett* (1858), 26 Beav. 125, in which it was decided that a bequest for purchasing the discharge of poachers, "committed to prison for non-payment of fines, fees or expenses under the game laws," was void, as encouraging offences and opposed to public policy.

There have been still fewer cases decided in this country, within the limits of our theme, of which the following are probably the most important.

A bequest to diffuse more generally the blessings of education, civilization and Christianity throughout the United States and elsewhere, was held to be void, on account of the generality of the object: *Owens v. Missionary So.* (1856), 14 N. Y. 380.

A bequest of slaves to trustees, "in trust for the American Colonization Society," in view of the obvious object and policy of the society, and its incapacity to hold slaves for any other purpose than for emancipation and colonization, was held to have been made for that purpose and no other, and to be prohibited by the law of Mississippi, and void: *Lusk v. Lewis, supra*. The above case affirmed the doctrine laid down in *Read v. Manning* (1855), 30 Miss. 308, in which it was decided that, where a testator, by his will, gave his slaves absolutely to his widow, but by a codicil thereto gave them to her, "if she

should marry and have issue, otherwise they should be set free," the codicil, although void to the extent of the attempted emancipation of the slaves, revoked the bequest of them made in the will.

In *Jackson v. Phillips, supra*, it was decided that a bequest for the purpose of procuring a change in the laws, was not a charity. Also, that a bequest to secure the passage of laws granting women the right to vote and hold office, and the rights of men generally, has nothing of the idea of charity in it.

In this same case, it was further decided that a bequest to trustees, to prepare and circulate books and newspapers, the delivery of speeches, lectures and such other means, as, in their judgment, will create a public sentiment against slavery in this country, was a legal charity before slavery was abolished.

Taking all these cases, we find that, where bequests are contrary to public policy, or where they tend to break down or change existing laws in that particular community, they are void.

As I stated before, there are great numbers of cases where the charities were not sustained on account of indefiniteness or some other reason, but few have been held void on account of their object.

HOWARD C. LEVIS.

Mount Holly, N. J.

ABSTRACTS OF RECENT DECISIONS.

ATTORNEY-AT-LAW.

Contract between attorneys, one of whom had employed the others to assist him in a case in which he was to receive a contingent fee of one-sixth the amount recovered, stipulated that the former should pay the latter one-half his fee for their services; upon being tendered half of one-sixth the sum recovered the attorneys who had been thus employed expressed dissatisfaction with the amount, but finally gave a receipt in full, refusing to wait until application could be made to their clients for the allowance of an additional fee; such additional fee was, however, subsequently allowed to the attorney who was originally in the case; recovery for one-half of such additional fee could not be had against him by his former associates, the settlement between them being final and conclusive: *Conyers v. Graham*, S. Ct. Ga., Dec. 10, 1888.

BANKS AND BANKING.

Liquidating National Bank, whose franchises have been extended under the provisions of Act of July 12, 1882, may, after the expiration of the term of its charter, continue to elect officers and directors for the purpose of effecting the liquidation, but after such expiration the stock of the bank cannot be transferred, so as to give the transferee the right to share in the election of directors or to serve as a director. *Richards v. Attleborough Nat. Bank*, S. Jud. Ct. Mass., Jan. 2, 1889.

BILLS AND NOTES.

Draft was written by the person to whom it was directed, and made payable to the drawer's order; the former indorsed an acceptance before the drawer had signed and then gave the draft to the latter to raise money; the acceptor was liable to an indorsee for value before maturity. *Hopps v. Savage*, Ct. App., Md., Dec. 6, 1888.

Law of State where note, given in pursuance of a wagering transaction, is made, determines its validity, and the question is not affected by the law of another State where suit has been brought upon the note. *Sondheim v. Gilbert*, S. Ct. Ind., Nov. 27, 1888.

Notice of protest is sufficient under a statute, requiring it to be directed to the indorser's residence, when given as follows: Indorser had lived after the death of her father with her mother, in F., but after her marriage spent most of her time abroad, where her first husband died and she married again; in 1886, she returned with her husband to the home of her mother, in F., where she remained until June, 1887, and where the indorsement of the note was made; she and her husband then left F. for the purpose of going to England, with no intention of returning, but proceeded to

the seashore before sailing, for the health of a child; the sickness and death of the child detained them, and on August 23, they returned to F. for the sole purpose of burying their child, the funeral taking place from the house of indorser's mother; they remained in F. several days, not at the mother's house, but visiting other friends, and then returned to the sea-shore; the note was protested August 25, and the notice was mailed the same day, directed to indorser at her mother's house, although the notary was well acquainted with her plans. *Wachusett Nat. Bank v. Fairbrother*, S. Jud. Ct. Mass., Jan. 2, 1888.

Stipulation, in case of non-payment of note at maturity, to pay "costs of collecting the same, including attorney's commissions," is valid. *Bowie v. Hall*, Ct. App. Md., Nov. 23, 1888

CHAMPERTY AND MAINTENANCE.

Contingent fee, to be paid for the prosecution of a claim before the Court of Commissioners of Alabama Claims, is not illegal on the ground of champerty. *Maning v. Sprage*, S. Jud. Ct. Mass., Nov. 28, 1886.

CHATTEL MORTGAGE.

Crop to be grown may be mortgaged by the owner of the soil before the crop is planted. *McCown v. Mayer*, S. Ct. Miss., Nov. 5, 1888.

CORPORATIONS.

Mortgage bondholders, who subscribe to the debenture bonds of a corporation, agreeing to pay specified portions of their subscriptions as called for, thereupon receiving the bonds, are not in a position analogous to subscribers to capital stock; their undertaking is no more than an agreement to loan the corporation money, and creditors cannot maintain a bill to compel payment of such subscriptions. *Pettibone v. Toledo, C. & St. L. R. Co.* S. Jud. Ct. Mass., Jan. 2, 1889.

EVIDENCE.

Proof is admissible, in an action to recover for injuries sustained from a vehicle, driven at an immoderate rate of speed through the streets of a city, that there was more travel upon the street where the accident occurred than upon any other street in the city. *Stringer v. Frost*, S. Ct. Ind., Jan. 8, 1889.

FIRE INSURANCE.

Live stock, insured, together with a barn and contents, against fire or lightning, by a policy which provided that the insurer should not be liable for the loss of any property, while removed from the barn, were killed by lightning while at pasture in a field; the loss was not covered by the policy. *Haws v. St. Paul Fire & Marine Ins. Co.*, S. Ct. Pa., Oct. 29, 1888.

Notary's certificate, in proof of loss, furnished in compliance with the requirements of the policy, is not conclusive upon the assured,

and evidence is admissible to show that the loss actually sustained was greater than the amount certified to. *Birmingham Fire Ins. Co. v. Pulver*, S. Ct. Ill., Nov, 15, 1888.

Recovery on policy may be had, although the insurer has already paid the amount of a second policy issued as a substitute for that sued on to a person, who, wrongfully claiming the property insured, took out such policy without the consent of the original insurer, and was subsequently compelled by a decree in chancery to account to the latter for its proceeds. *Commercial Union Assur. Co. v. Scammon*, S. Ct. Ill., Nov. 15, 1888.

HUSBAND AND WIFE.

Marriage contract, which provides that all the furniture, plate, horses, carriages, and other personal property, "in use by the parties for family purposes," at the death of either, shall vest in the survivor, does not include property in the nature of heir-looms. *Gorham v. Fillmore*, Ct. App. N. Y., Nov. 27, 1888.

LANDLORD AND TENANT.

Death of lessee does not break a clause in the lease against alienation, as the stipulation refers only to a voluntary transfer. *Charles v. Byrd*, S. Ct. S. C., Nov. 27, 1888.

Leasehold estate for ninety-nine years, renewable forever, though a chattel real, is personalty and subject to the rules governing that class of property, and the unexpired term may, therefore, be conveyed by a deed reserving its use and enjoyment during the life of the grantor. *Culbreth v. Smith*, Ct. App. Md., Nov. 23, 1888.

LIBEL AND SLANDER.

Communication to wife by husband of slanderous words in regard to a woman, is a publication, and will sustain a criminal prosecution. *State v. Shoemaker*, S. Ct. N. C., Dec. 18, 1888.

LIFE INSURANCE.

Knowledge of assistant superintendent of district for an insurance company, obtained while performing the duties of his agency, that a policy-holder is engaged in the liquor business, will be imputed to the company, and, where the latter continues to receive premiums from such policy-holder, a forfeiture stipulated in the policy for carrying on such business will be considered waived, even though the policy expressly states that agents have no authority to waive forfeitures. *McGurk v. Metropolitan Life Ins. Co.*, S. Ct. Err. Conn., Dec. 18, 1888.

Refusal to furnish blanks for proof of death, on the ground that a policy had been forfeited, is a waiver of the condition requiring such proof to be made. *Dial v. Valley Mut. Life Asso.* S. Ct. S. C., Nov. 27, 1888.

LIMITATION.

Payments on joint note by one maker will arrest the running of the statute as against another maker, although the latter does not authorize nor participate in such payments. *Woonsocket Inst. for Savings v. Ballou*, S. Ct. R. I., Nov. 10, 1888.

War period, from Jan. 11, 1861, to Sept. 21, 1865, is to be deducted in Alabama in any computation covering those years in which the time necessary to perfect a statutory bar is the subject of inquiry, but not from the twenty years necessary to raise a presumption against claims suffered to slumber for that length of time. *Black v. Pratt Coal and Coke Co.*, S. Ct. Ala., Dec. 6, 1888.

LIQUOR LAWS.

Selling from wagon on highway, not at or near the seller's house, without a license, will not sustain a conviction under a statute which forbids the unlicensed sale of liquor to be drunk in the seller's "house, out-house, yard, garden, or the appurtenances thereto belonging." *Schilling v. State*, S. Ct. Ind., Nov. 27, 1888.

Servant, who, in the absence of proprietor of a saloon, makes illegal sales of liquor, or otherwise assumes control of the premises, may be convicted of keeping and maintaining such saloon. *Comm. v. Brady*, S. Jud. Ct. Mass., Nov. 26, 1888.

Validity of election, by which a local option law was adopted, cannot be called in question by way of defence to a prosecution for the violation of such law. *State v. Cooper*, S. Ct. N. C., Dec. 10, 1888.

MASTER AND SERVANT.

Chief manager, employed by corporation at a monthly salary, to take charge of works, without authority to buy new articles or repair machinery, but who sometimes makes slight repairs without orders, hires and discharges employes, and keeps and reports their time to the officers of the corporation, who themselves frequently inspect the works, is but a fellow-servant of a workman, and the corporation is not liable to the latter for such manager's negligence in the care of the machinery. *Yates v. McCullough Iron Co.*, Ct. App. Md., Nov. 22, 1888.

NEGLIGENCE.

Contributory negligence is chargeable to one who is injured by falling at night into a hole in a side-walk, which was between, and about eighty feet from, two gas-lamps, by the light of which the hole could have been plainly seen. *Moore v. City of Richmond*, S. Ct. App. Va., Dec. 13, 1888.

Municipal corporation is not liable for damages sustained by one driving in a public street, by reason of a rope having been stretched across the street, by order of the judge of a State Court, in order to prevent travel on the street, and the resulting noise. *Belvin v. City of Richmond*, S. Ct. App. Va., Dec. 13, 1888.

PUBLIC OFFICERS.

Clerk of Court is liable to the county, upon his official bond, for a failure to record pleadings and judgments, as required by law, especially in criminal cases, for which he has been paid by the county. *Chester Co. v. Hemphill*, S. Ct. S. C., Nov. 27, 1888.

RAILROADS.

Disorderly passenger, or one using profane, obscene, or vulgar language, notwithstanding that he has a ticket, has no right to remain on a train, and, if he resists expulsion by drawing a pistol, and a combat with pistols results between him and the conductor, during which he is wounded, the railroad company is not liable for the injury sustained. *Peavy v. Georgia R.R. Co.*, S. Ct. Ga., Dec. 3, 1888.

STATUTE OF FRAUDS.

Memorandum in writing, sufficient to comply with statute, is constituted, where a salesman took a verbal order for goods, reduced it to writing and mailed it to the vendor, and the vendee subsequently wrote, "Don't ship paint ordered through your salesman," but before the letter was received, the goods had been already shipped, there being no other transaction between the parties. *Louisville Asphalt Varnish Co. v. Lorick*, S. Ct. S. C., Nov. 27, 1888.

TRADE-MARKS.

Assignment of business, with debts and plant, includes trade-marks used in such business, and gives the assignee the exclusive right thereto. *Merry v. Hoopes*, Ct. App. N. Y., Nov. 27, 1888.

WASTE

Taking clay from soil by life-tenant, and manufacturing the same into brick, to be sold, is waste, and will be restrained by injunction upon application of a contingent remainderman. *University v. Tucker*, S. Ct. App. W. Va., Dec. 1, 1888.

WILLS.

Condition annexed to devise or bequest, avoiding it if the devisee or legatee marry into the "family" of a person named, without any limitation over, is valid, and, in the absence of anything in the context to the contrary, means marriage with one of the children of such person. *Phillips v. Ferguson*, S. Ct. App. Va., Dec. 5, 1888.

Gift of income of fund, without limitation as to continuance or time, passes the fund itself, whether the gift be made directly or through the intervention of a trustee. *Bishop v. McClelland's Ex'rs*, Ct. Ch. N. J., Nov. 13, 1888.

JAMES C. SELLERS.

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MATTERS REQUIRING JUDICIAL NOTICE.

I.

To require that every step in judicial proceedings be fortified by evidence, as that the Court has territorial jurisdiction, or of the subject-matter, or the like, would not only be a manifest absurdity, but would divert attention from the real issues involved, and the trial of a cause might descend into a useless wrangle over abstractions. That parties should be permitted, then, to rely securely upon the Court as to certain facts, is an absolute necessity. It is usual to regard what may be termed the routine matters of judicial proceedings, as being settled: yet they are so held as established, simply because the Court takes judicial notice of them. But there are other matters, frequently somewhat or even quite collateral to the issues being tried, that may receive recognition from the Court without being pleaded or proved. These classes of facts are so diverse and various in character that the Courts are often called upon, without having the benefit of any precedent applying thereto, to determine whether or not they should be thus received.

Perhaps no subject falling within the administration of the law, so constantly calls for the exercise of a sound discretion by the Courts, as that of judicial notice. This arises mainly from the fact that those matters which the Court will thus recognize, are, for the most part, only capable of classification under a few heads, and thus the generality of their

description would include facts which unquestionably require averment and proof. The general ground, or rule, if it may be so called, which can be applied to all phases of the subject is, that in receiving this class of facts without averment or proof, Courts simply act on knowledge of their truth. But this should not be understood as an assumption by the judges of any special or technical knowledge of the matter; they merely recognize the fact in question as being already sufficiently established. Three classes of facts naturally follow as many divisions of the rule, of which there can be no question that Courts will take judicial notice: *first*, matters of public law, which all are bound to know; *second*, matters so notorious as to be regarded as universally known; and *third*, matters peculiarly within the cognizance of the particular Court: 1 Phil. Ev., § 619.

However clear the rule may be as to primary distinctions, the real question must at last rest with the Court for solution. While all Courts agree, for instance, that every public law, enacted by the proper legislative authority, must receive judicial notice within the same jurisdiction, it still remains for the Court to say whether or not the particular act be a public statute; and although a fact may be of undoubted notoriety, to establish this, might be more difficult than to prove the fact itself.

The limits, therefore, beyond which Courts may not safely pass, are regulated more by the soundness of judgment and sense of justice of the judges, than by any fixed rules that can be adopted. It follows that in many instances the admissibility of this class of facts must depend upon the peculiar circumstances existing in each particular case. Nor is it essential to its judicial reception that the Court have a complete knowledge of the fact; for no division of opinion exists that this information may be obtained from any authentic source. Thus stamped with the seal of absolute verity, this class of facts may be embraced in instructions to juries, without interference with their prerogative as triers of fact. The restrictions surrounding the admission of judicial notice of such facts as are in their nature official, legislative, political, judicial, commercial, historical, geographical, scientific

and artistic, are usually so manifest as to admit of comparative certainty in their application; but, in addition to these, notice will be taken of a wide range of matters of uniform natural occurrence, and those generally arising in the usual course of life, the claim for recognition of which consists in their certainty and notoriety.

While this peculiar power of the Courts will invariably be exercised with caution in regard to the latter classes of facts, much care is required that no mistake be made in the truth of the fact assumed, that the requisite notoriety exists; and all reasonable doubts upon the subject should be promptly resolved in the negative: *Brown v. Piper* (1875), 91 U.S. 37.

As already indicated, while this subject has the sanction of well-settled principles of the law, the questions presented under it are often incapable of reference to any positive rule of decision, and the result is that perhaps in no other branch of jurisprudence do the adjudicated cases exhibit so wide a range of circumstances, affording, for this reason, the most practical view of the subject.

II.

As all civilized nations constitute one great family of sovereign states, they recognize each other's existence and general public and external relations, including Acts of State, and their Courts take judicial notice of the national flags and seals, as the highest emblems of sovereignty: *Griswold v. Pitcairn* (1816), 2 Conn. 85; *The Santissima Trinidad* (1822), 7 Wheat. (20 U. S.) 283. The public seal of a state, properly affixed to proceedings, either judicial or diplomatic, is taken notice of as a part of the law of nations and proves itself: *Lincoln v. Battelle* (1831), 6 Wend. (N. Y.) 475. But where a foreign *de facto* government has not been recognized by the executive power of the government under which the Court is organized, its seal cannot be admitted to prove itself: *U. S. v. Palmer* (1818), 3 Wheat. (16 U. S.) 634; *City of Berne in Switzerland v. Bank of England* (1804), 9 Ves. Jun. 347; *Dolder v. Lord Huntingfield* (1805), 11 Id. 283.

Foreign judgments are judicially noticed when they are

authenticated, either by the great seal, by a copy proved to be a true copy, or by a certificate of an officer authorized by law, and this certificate is itself properly authenticated: *Church v. Hubbard* (1804); 2 Cranch (6 U. S.), 187.

The law of nations is of force, not because it has been prescribed by any superior power, but because it has been generally accepted as a rule of conduct: *The Scotia* (1871), 14 Wall. (81 U. S.) 170. The law of nations, which is acknowledged generally as binding on all independent states, and as affecting the rights of their citizens or subjects, is derived from three sources: *first*, from the long and ordinary practice of nations, which affords evidence of a general custom, tacitly agreed to be observed until expressly abrogated; *second*, the recitals of what is acknowledged to have been the law or practice of nations, and which will frequently be found in modern treaties; *third*, the writings of eminent authors, who have long, by a concurrence of testimony and opinion, declared what is the existing international jurisprudence: Vattel's Law of Nations (Chitty), § 8, note 1.

Under prize and admiralty jurisdiction, the law of nations controlling these matters is frequently noticed and applied by the Courts. The established law upon the subject in England is, that the sentence of a foreign Court of competent jurisdiction, condemning the property upon the ground that it was not neutral, is so entirely conclusive of the fact decided that it can never be controverted, directly or collaterally, in any other Court having concurrent jurisdiction: *Bolton v. Gladstone* (1804), 5 East, 155; *Oddy v. Boville* (1802), 2 Id. 478; *Lothair v. Henderson* (1803), 8 B. & P. 499; *Hughes v. Cornelius* (Trin. Term, 32 Car. 2), 2 Show. 242. Substantially the same doctrine prevails in the Supreme Court of the United States: *Croudson v. Leonard* (1808), 4 Cranch (8 U. S.), 434. In the State of New York a somewhat different rule obtains, and it is there held that, if it appear from the proceedings in the prize Court that the condemnation was a breach of the law of nations, it will not be considered as binding upon the Courts of other countries upon the question of neutrality, but that, in making this inquiry, the Courts cannot take judicial notice of the municipal laws

of the foreign country: *Ocean Ins. Co. v. Francis* (1828), 2 Wend. (N. Y.) 64. Of course, the seal of a Court of Admiralty proves itself, and when it appears to have been affixed to a decree by the deputy registrar, it will be received: *Thompson v. Stewart* (1819), 3 Conn. 171.

Courts will also take judicial notice of and apply the law merchant as a part of the law of nations: *Jewell v. Center* (1854), 25 Ala. 498. The various customs entering into and comprising the law merchant, having all repeatedly received judicial sanction, are universally recognized as forming a system of established facts not subject to proof. Thus, the notary's certificate and seal, when used in this connection, is noticed the world over; and with equal facility is the almanac received, as the basis of judicial notice of the time of presentation and non-payment of a foreign bill of exchange: *Reed v. Wilson* (1879), 41 N. J. L. 29; *Bank of Columbia v. Fitzhugh* (1827), 1 H. & G. (Md.) 239; *Branch v. Burnley* (1797), 1 Call (Va.), 147; *Wiggins v. Chicago* (1878), 5 Mo. App. 347; *Consequa v. Willings* (1816), 1 Pet. U. S. C. C. 225; *Munn v. Burch* (1860), 25 Ill. 85; *Goldsmith v. Sawyer* (1873), 46 Cal. 209.

The English Courts apply essentially the same principles to this subject as our own; but they are required to take judicial cognizance of numerous facts not existing in this country. Of these are the accession and demise of the sovereign: *Holman v. Burrow* (Trin. Term, 1 Anne), 2 Ld. Ray. 791; s. c. Salk. 658. The correspondence of the year of any particular reign with the year of our Lord: *Henry v. Cole* (Mich. Term, 1 Anne), 2 Ld. Ray. 811; s. c. 7 Mod. 103; *Regina v. Pringle* (1840), 2 Moo. & R. 276. The prerogatives of the Crown and the privileges of the royal palaces; *Elderton's Case* (Trin. Term, 2 Anne), 2 Ld. Ray. 978; s. c. Salk. 284; *Winter v. Miles* (Sittings after East., 48 Geo. 3), 1 Camp. 475; *Att'y-Gen. v. Donaldson* (1842), 10 M. & W. 117. In like manner they take notice of the great and privy seals, and also of the sign manual: *Rex v. Miller* (1772), 2 W. Bl. 797; s. c. 1 Leach, 74; *Rex v. Gully* (1773), 1 Id. 98. They also take notice of royal proclamations, as being acts of state; but not of orders of council: *Wells v. Williams*

(Mich. Term, 9 Will. 3), 1 Ld. Ray. 282; *a. c.* 1 Salk. 46; *Dupays v. Shepherd* (Mich. Term, 10 Will. 3), 12 Mod. 216; *Rex v. Sutton* (1816), 4 M. & S. 582; *Att'y-Gen. v. Theakstone* (1820), 8 Price, 89. Judicial cognizance is also taken of the commencement of the sessions, prorogations, and dissolutions of Parliament, and of the place where any particular Parliament sat: *Rex v. Wilde* (Mich. Term, 22 Car. 2, B. R.), 2 Keb. 686; *Birt v. Rothwell* (East. Term, 9 Will. 3), 1 Ld. Ray. 210, 848. They will also notice the customs, privileges and proceedings of Parliament, and of each branch of the Legislature: *Lake v. King* (Hil. Term, 19 & 20 Car. 2), 1 Saund. 181, a; *Astley v. Younge* (1759), 2 Burr. 811. But they will not take notice of the journals of either House, as they are held not to be the records of the Parliament: *Rex v. Knollys* (Trin. Term, 6 Will. & Mar.), 1 Ld. Ray. 10, 15.

III.

The authorities admit of no question that the existence and tenor of all public statutes of the State, and the time when they took effect, will be judicially noticed by the Courts having their organization or sitting within the same jurisdiction. This recognition rests, indeed, not only upon the fact of their being a part of the law of the land, which all are bound to know, but is equally required by the official authentication of a co-ordinate branch of the government: *Lane v. Harris* (1854), 16 Ga. 217; *State v. Bailey* (1861), 16 Ind. 46; *Heaston v. Cincinnati, etc. R. R. Co.* (1861), Id. 275; *Pier-son v. Baird* (1849), 2 G. Gr. (Iowa), 235; *Berliner v. Waterloo* (1861), 14 Wis. 378. It is held still further, that the existence and time of taking effect of a public Act, cannot be put in issue, or admitted or denied by the pleadings, but must be determined by the judges themselves: *Att'y-Gen. v. Foote* (1860), 11 Wis. 14; Sedgwick on Stat. & Const. Law, 94, 118; Potter's Dwarries on Stat. 169. The same rule governs both National and State Courts, in regard to all public Acts of Congress, or which are declared to be such: *Morris v. Davidson* (1873), 49 Ga. 361; *Canal Co. v. Railroad Co.* (1882), 4 G. & J. (Md.) 63; *Kessel v. Albetis* (1870), 56 Barb. (N. Y.) 362; *Mimms v. Schwartz* (1873), 37 Tex. 13; *Bird v. Commonwealth*

(1871), 21 Grat. (Va.) 800; *Bayly's Adm'rs v. Chubb* (1862), 16 Id. 284; *The Scotia* (1871), 14 Wall. (81 U. S.) 171.

In like manner the United States Circuit Courts take notice of State laws applying to cases depending before them: *Merrill v. Dawson* (1848), 1 Hemp. U. S. C. C. 563; *Jones v. Hays* (1849), 4 McLean, U. S. C. C. 521; *Jasper v. Porter* (1841), 2 Id. 579.

The doctrine is well settled in the Supreme Court of the United States, that the laws of the several States form a homogeneous system of domestic jurisprudence, which, under the judicial powers conferred on the government by the Constitution, the national tribunals are bound to take judicial notice of and administer alike in all the States, whenever their jurisdiction of the same is properly invoked: *Carpenter v. Dexter* (1869), 8 Wall. (75 U. S.) 513; *Fourth Nat. Bank v. Franklyn* (1887), 120 U. S. 747; *United States v. Turner* (1850), 11 How. (52 U. S.) 668; *Miller v. McQuerry* (1858), 5 McLean, U. S. C. C. 469.

As falling within the same rule, not only the laws, but the judicial decisions in the several States, will be so noticed; and while the judicial knowledge of the Federal Courts extends at all times to the laws and jurisprudence of all the States, as a general rule these Courts will follow the construction placed upon a statute of a State by its Court of last resort: *Hinde v. Vattier* (1831), 5 Pet. (30 U. S.) 398; *Pennington v. Gibson* (1853), 16 How. (57 U. S.) 65, 81; *Elmendorf v. Taylor* (1825), 10 Wheat. (23 U. S.) 152.

Following the same principle, it is held, that where judgments of a State Court, by reason of their affecting a right under the Federal Constitution and legislation, would be reversible in the Supreme Court of the United States, the State Courts will take judicial notice of such laws of other States as the United States Court would notice on appeal; and this is placed upon the very sufficient ground that it would be a discordant practice for the Court of original jurisdiction to adopt a different rule of decision from the one held by the Court of last resort: *State of Ohio v. Hinchman* (1856), 27 Pa. 479; *Jarvis v. Robinson* (1867), 21 Wis. 523; *Butcher v. Brownsville* (1863), 2 Kan. 70; *Paine v. Schenectady* (1876),

11 R. I. 411; *Shotwell v. Harrison* (1871), 22 Mich. 410; *Saltar v. Applegate* (1851), 23 N. J. L. 115. And even where an Act of Congress relates exclusively to the District of Columbia, it will be judicially noticed by the Courts of the several States: *Bayly's Adm'rs v. Chubb*, *supra*. So, Acts of Congress confirming foreign laws, such as grants of lands in Missouri and other States, whose territory has been acquired by the United States from a foreign power, will be judicially noticed as public acts: *Papin v. Ryan* (1862), 32 Mo. 21.

IV.

It becomes necessary to determine the character of statutes, which constitutes them public acts, and thus entitled to judicial notice. It must be conceded that a statute which is general in its character and equally applicable to all parts of the State, is a public act. Many State Constitutions contain restrictions upon private or class legislation by requiring that there shall be no special, local, or private law, in any case for which provision has been or may be made by general law.

In some of them, this limitation applies in any case where the relief sought can be given by any State Court. In Indiana and Oregon, every statute is declared by the Constitution to be a public law, unless otherwise provided in the statute itself.

Statutes may be public acts, and yet apply only to certain localities. It is not necessary that it should extend to all parts of the State; it is a public act, if it extends equally to all persons within the territorial limits described in the statute: *Burnham v. Webster* (1809), 5 Mass. 266. In accordance with this view, laws upon the following subjects have been held to be public acts: regulating the sale of liquors in a particular locality: *Levy v. State* (1855), 6 Ind. 281; *Inglis v. State* (1878), 61 Id. 212; an act to regulate the lumber trade in a certain district: *Pierce v. Kimball* (1882), 9 Me. 54; and a statute granting a portion of the public domain, and affecting the rights of navigation and fishing,

by allowing improvements to be extended into navigable waters: *Hammond v. Inloes* (1858), 4 Md. 188.

The doctrine seems to be fully supported by the authorities, that the character of an Act of the Legislature, whether it be a general law or not, is determined by the greater or less extent to which it affects the people, rather than by the extent of territory over which it operates; therefore a law affecting a single county, but affecting the rights of all the people therein, is a general law: *State ex rel. Cothren v. Lean* (1859), 9 Wis. 279; *Clarke v. City of Janesville* (1859), 10 Id. 136, 195; *Rains v. Oshkosh* (1861), 14 Id. 872; *Mills v. Gleason* (1860), 11 Id. 470.

Some little fluctuation in opinion has resulted in establishing, upon authority, that Courts will judicially notice the charter or incorporating Act of a municipal corporation, not only when it is declared to be a public statute, but when it is public or general in its purposes, though there be no express provision to that effect: *Dillon on Municipal Corp.* (8d ed.) sect. 83. This rule rests upon the ground that municipal corporations are public institutions, created for public purposes. The municipality is a political subdivision or department of the State, governed, regulated, and constituted by public law; the agents who administer its affairs derive their powers from legislative authority: *Payne v. Treadwell* (1860), 16 Cal. 220; *Village of Winooski v. Gokey* (1877), 49 Vt. 282; *Case v. City of Mobile* (1857), 30 Ala. 538; *Stier v. Oskaloosa* (1875), 41 Iowa, 353; *Prell v. McDonald* (1871), 7 Kan. 426; *State v. Sherman* (1868), 42 Mo. 210; *Gallagher v. State* (1881), 10 Tex. Ct. App. 469; *Alexander v. Milwaukee* (1862), 16 Wis. 247; *Briggs v. Whipple* (1835), 7 Vt. 15; *Washington v. Finley* (1850), 10 Ark. 423. In like manner, Courts will notice the repeal of a section of an incorporating Act: *Belmont v. Morrill* (1879), 69 Me. 314.

Where the existence of an Act, incorporating a town, had been previously recognized by the Supreme Court of the then Territory, the same Court for the State, long afterward, took judicial cognizance of the legality of the corporation, even though the Act itself could not be found: *Swan v. Comstock* (1864), 18 Wis. 463. Under the rule as stated, for the Court

to notice a special charter, is to recognize the corporation, but, when the town or city is organized under the general law, its incorporation must be proved, for, though the Court will take notice of the law, it cannot know that its provisions as to organizing under it have been complied with: *Ward v. City of Decorah* (1876), 43 Iowa, 818. In the same direction, it was decided by the Supreme Court of Indiana, that while it would take judicial notice of all the laws authorizing the formation of plank-road companies, it could not know under which one of them a particular company was organized: *Danville, etc. Co. v. State* (1861), 16 Ind. 456. The same Court refused judicial notice of the names of the townships in a county, because they were established by the commissioners and not by public law: *Bragg v. Rush County* (1870), 84 Ind. 405. While this objection may be sufficient in the appellate tribunal, it could not apply in any Court of general jurisdiction, sitting within the county, where the fact would appear of record. It has been held, however, that evidence in the record that a municipality has exercised its corporate powers under a general law, will sustain the Court in taking judicial notice of its organization under the same: *Doyle v. Bradford* (1878), 90 Ill. 416; following *Brush v. Lemma* (1875), 77 Id. 496.

V.

Acts of the Legislature incorporating banks have generally been judicially recognized as public statutes or general laws: *Buell v. Warner* (1861), 33 Vt. 570. Where the bank partakes of the character of a State institution, the Courts will take judicial notice of the fact of its existence, and that its notes constitute a circulating medium and are of value: *Shaw v. State* (1855), 3 Sneed (Tenn.), 86. Whenever any question as to the incorporation of a bank arises collaterally, Courts will take judicial knowledge of its existence and corporate powers: *Hays v. Northwestern Bank* (1852), 9 Grat. (Va.) 127; *United States v. Amedy* (1826), 11 Wheat. (24 U. S.) 392; *The People v. Hughes* (1865), 29 Cal. 258; *Davis v. Bank of Fulton* (1860), 31 Ga. 69; *Cowan v. State* (1887), 22 Neb. 519.

General laws, incorporating railroad companies, are judicially noticed, the same as other public acts; or, if the charter be private in form, but is declared by the Legislature to be a public statute; and it has been held that publication with other enactments of a public character, will entitle such acts to judicial notice: *Hill v. Brown* (1877), 58 N. H. 93; *Atchison, etc. R. R. Co. v. Blackshire* (1872), 10 Kan. 477; *Perry v. New Orleans, etc. R. R. Co.* (1876), 55 Ala. 413; *Ohio, etc. R. R. Co. v. Ridge* (1889), 5 Blackf. (Ind.) 78. The following acts have been declared by the Courts to be public laws, and thus entitled to judicial recognition: the general law relating to highways: *Griswold v. Gallop* (1852), 22 Conn. 208; acts defining the boundaries of counties: *Ross v. Reddick* (1832), 2 Ill. 73; a joint resolution, imposing a particular duty upon an officer of the State: *State v. Delesdenier* (1851), 7 Tex. 76. Acts of a State Legislature, or of Congress, called for, recognized, or adopted by public laws of any State, will be judicially noticed by the Courts of such State: *Canal Co. v. Railroad Co.*, *supra*; and where a public act expressly amends a private act, the existence and duties of an office provided for in the latter, will be judicially recognized: *Lavalle v. People* (1880), 6 Bradw. (Ill.) 157.

The rule is well settled that statutes which are declared by the Legislature, at the time of their enactment, to be public acts, will be judicially noticed by the Courts: *Hammett v. Little Rock R. R. Co.* (1859), 20 Ark. 204; *Eel River Drain. Ass'n v. Topp* (1861), 16 Ind. 242; *Covington Drawbridge Co. v. Shepherd* (1857), 20 How. (61 U. S.), 227; *Beaty v. Knowles* (1830), 4 Pet. (29 U. S.), 152. The same rule prevails when Courts are required by the Legislature to notice private statutes: *Bixler's Admr's v. Parker* (1867), 3 Bush (Ky.), 166; *Halbert v. Skyles* (1818), 1 A. K. Marsh. (Ky.), 368; *Hart v. Baltimore, etc. R. R. Co.* (1873), 6 W. Va. 336; *Collier v. Baptist Society* (1847-8), 8 B. Mon. (Ky.) 68; *Somerville v. Winbush* (1850), 7 Grat. (Va.) 205.

VI

As to how far the Courts will go in taking judicial cognizance of the correct reading of a statute, or whether in its

enactment all constitutional requirements affecting its validity have been complied with, the authorities are not entirely uniform. On the one hand it is held, with strong support, that "Courts are bound judicially to take notice of what the law is, and to enable them to determine whether all the constitutional requisites to the validity of a statute have been complied with, it is their right, as well as duty, to take notice of the journals of the Legislature, and no plea is necessary to bring to the notice of the Court facts which the Court must judicially know, and in respect to which no proof can be given:" *People ex rel. Drake v. Mahaney* (1865), 13 Mich. 481; *Coburn v. Dodd* (1860), 14 Ind. 347; *Board of Supervisors v. Heenan* (1858), 2 Minn. 830; *People v. Purdy* (1841), 2 Hill (N. Y.), 81; *De Bow v. People* (1845), 1 Denio (N. Y.), 9; *People v. River Raisin, etc. R. R. Co.* (1864), 12 Mich. 889; *Commercial Bank of Buffalo v. Sparrow* (1846), 2 Denio (N. Y.), 97.

On the other hand, in *Illinois Central R. R. Co. v. Wren* (1867), 43 Ill. 77, and *Bedard v. Hall* (1867), 44 Id. 91, the Supreme Court of that State holds that judicial notice cannot be taken of the journals of the Legislature upon this question; while in the case of the *Pacific R. R. Co. v. Governor* (1856), 23 Mo. 858, and the following cases cited, these Courts seem to sustain the view that the certificates of the presiding officers of the two houses of the Legislature are, officially, of equal or superior weight with the journals themselves: *Duncombe v. Prindle* (1861), 12 Iowa, 1; *Green v. Weller* (1856), 82 Miss. 650; *Fouke v. Fleming* (1858), 18 Md. 392; *People v. Devlin* (1865), 33 N. Y. 269; *Pangborn v. Young* (1866), 32 N. J. L. 29; *Root v. King* (1827), 7 Cow. (N. Y.), 613; *Kilbourne v. Thompson* (1880), 103 U. S. 168; *Chicago & A. R. R. Co. v. Wiggins Ferry Co.* (1887), 119 Id. 615.

On this point, in a recent and somewhat well-considered opinion, which is sustained by numerous citations, the Supreme Court of Nebraska held that "the certificate of the presiding officer of a branch of the Legislature that a bill has duly passed the house over which he presides, is merely *prima facie* evidence of the fact, and evidence may be received to ascertain whether or not the bill actually passed. The journals of

the respective houses are records of the proceedings therein, and if it should appear from them that a bill had not actually passed, the presumption in favor of the certificate would be overthrown and the Act declared invalid:" *State ex rel. Huff v. McLelland* (1885), 18 Neb. 236; *Clare v. State* (1857), 5 Iowa, 509; *Evans v. Browne* (1869), 30 Ind. 514; *Madison Co. Com'rs v. Burford* (1888), 98 Id. 888.

In *Gardner v. Collector* (1867), 6 Wall. (73 U. S.) 499, the Supreme Court of the United States adheres to substantially the same rule which, with the additional support of the following decisions, would seem to carry the weight of authority decidedly in favor of this view of the matter: *Legg v. Mayor* (1874), 42 Md. 203; *Berry v. Drum Point R. R.* (1874), 41 Id. 446; *Moody v. State* (1872), 48 Ala. 115; *People v. De Wolf* (1871), 62 Ill. 253; *State v. City of Hastings* (1877), 24 Minn. 78; *Southwick Bank v. Commonwealth* (1856), 26 Pa. 446; *Jones v. Hutchinson* (1868), 43 Ala. 721; *Fowler v. Pierce* (1852), 2 Cal. 165; *Speer v. Plank Road Co.* (1853), 22 Pa. 376; *Opinion of the Justices* (1864), 45 N. H. 607; *Opinion of the Justices* (1858), 35 Id. 579; *Opinion of the Justices* (1873), 52 Id. 622; *Coleman v. Dobbins* (1856), 8 Ind. 156.

VII.

The Constitution is the fundamental law of the State, in opposition to which any other law, or any direction or order, must be inoperative and void. If, therefore, such other law, direction, or order, seems to be applicable to the facts, but on comparison with the fundamental law, the latter is found to be in conflict with it, the Court, in declaring what the law of the case is, must necessarily determine its invalidity, and thereby effectually annul it: *De Chastellux v. Fairchild* (1850), 15 Pa. 18.

The Courts take judicial notice of all constitutional amendments, and when the same went into force: *Graves v. Keaton* (1866), 3 Cold. (Tenn.) 8.

Judicial notice is taken of the common law, as the basis of our system of jurisprudence. It is recognized as a system of grand principles, founded on the mature and perfected reason of centuries, that have grown up irrespective of statutes, and

which, no matter how recently announced, are assumed to have existed from time immemorial; and in the administration of justice as embodying the rules upon which remedies are given in a vast majority of cases: *Wilson v. Bumstead* (1881), 12 Neb. 1.

For these reasons, Courts will not hesitate to apply the common law to any condition of facts, however novel this application may seem; for it would have but little claim to the admiration to which it is entitled, if it failed to adapt itself to any condition, however new, which may arise; and it would be singularly lame, if it were impotent to determine the right of any dispute whatsoever: *Conger v. Weaver* (1856), 6 Cal. 548.

A treaty is the supreme law of the land by which judges in every State must be bound, and no Act of the Legislature can stand in its way: *Hauenstein v. Lynham* (1879), 10 Otto (100 U. S.) 488. So far as the power of the contracting parties is concerned, a treaty with an Indian tribe is like a treaty with a foreign power, and equally as binding as a law of Congress: *U. S. v. Payne* (1881), 2 M'Crary (U. S. C. C. W. Dist. Ark.), 289; *Wilson v. Wall* (1867), 6 Wall. (73 U. S.) 88; *Dole v. Wilson* (1871), 16 Minn. 525; *U. S. v. Reynes* (1850), 9 How. (50 U. S.) 127. Courts are also required to notice extradition treaties; and where, in an action for slander in a State Court, the crime alleged to have been falsely charged was, that the plaintiff had committed a murder in Ireland, the Court took judicial notice that Ireland is within the jurisdiction of the British Empire, and that murder is a crime for which, under the extradition treaty with that Empire, the party was liable to be reclaimed and delivered up by the United States government for punishment: *Montgomery v. Deeley* (1854), 8 Wis. 709.

Public institutions, such as court-houses, jails, prisons, asylums, State universities, and the like, are entitled to judicial notice, not only from their public character and well-known situations, but as being established by law. The universities of Oxford and Cambridge, and that they were founded for the promotion of learning and religion, are taken notice of by the Courts in England, and no reason seems to exist

why many similar institutions in this country should not fall within the same rule: *Oxford Poor Rate* (1857), 8 E & B. 184-211.

VIII.

Judicial notice of foreign laws is not taken by the Courts of this country; and a claim or defence founded on a foreign law, must be alleged and proved; otherwise, the presumption is that the foreign law is the same as that of the forum: *Syme v. Stewart* (1865), 17 La. An. 78; *Chumusaro v. Gilbert* (1860), 24 Ill. 293; *Frith v. Sprague* (1817), 14 Mass. 455; *Baptiste v. De Volunbrun* (1820), 5 H. & J. (Md.) 86; *Hooper v. Moore* (1857), 5 Jones (N. C.) Law, 130; *Woodrow v. O'Connor* (1856), 28 Vt. 776; *Bean v. Briggs* (1857), 4 Iowa, 464; *Hilliard v. Outlaw* (1885), 92 N. C. 266; *Sloan v. Torry* (1883), 78 Mo. 623; *Owen v. Boyle* (1838), 15 Me. 147. The common or unwritten law of a foreign country and the construction given to a foreign statute, by usage and judicial decisions, which thus becomes a part of the unwritten law, must be proved by the testimony of experts: *Dyer v. Smith* (1837), 12 Conn. 384. Of a printed volume, purporting to contain the statutes of a foreign country, being received to prove them, it may perhaps be safely said that some extrinsic evidence of its authenticity will generally be required.

As a general rule the laws of one State will not be judicially noticed by the Courts of another State. Their relation to each other in the Union is that of foreign States in close friendship, and the rules for the proof of foreign laws are relaxed as to the statutes of sister States; a printed volume, assuming to contain them and published by the State authority, will be received in all cases as *prima facie* evidence to establish what are the laws of any particular State: *Irving v. McLean* (1835), 4 Blackf. (Ind.) 52; *Cook v. Wilson* (1821), Litt. Sel. Ca. (Ky.) 437; *Ripple v. Ripple* (1829), 1 Rawle (Pa.), 386; *Sims v. Southern Express Co.* (1868), 38 Ga. 129; *Hoyt v. McNeil* (1868), 13 Minn. 390; *Rape v. Heaton* (1859), 9 Wis. 328; *Drake v. Glover* (1857), 30 Ala. 382; *Anderson v. Anderson* (1859), 23 Tex. 639; *Carey v. Cincinnati, etc. R. R. Co.* (1857), 5 Iowa, 357; *Whitesides v. Poole* (1855), 9 Rich.

(S. C.) 68; *Taylor v. Boardman* (1858), 25 Vt. 581; *Newton v. Cooke* (1849), 10 Ark. 169; *Miller v. Avery* (1848), 2 Barb. (N. Y.) Ch. 582; *Anderson v. Folger* (1856), 11 La. An. 269; *De Sobry v. De Laistre* (1807), 2 H. & J. (Md.) 191; *Mason v. Wash* (1822), 1 Ill. 16; *Boggs v. Reed* (1819), 5 Mart. (La.) 673.

Where a new State has been erected from an older one, or the territory composing a State formerly belonged to a foreign power, an exception is made as to foreign laws; those in force before the separation or acquirement of the territory by the United States, are judicially noticed by the Courts within the States thus formed. Accordingly, the Supreme Courts of Louisiana and Missouri, and the Supreme Court of the United States, take judicial notice of the Spanish laws prevailing in the then territory of Louisiana, before the cession to the United States: *Pequet v. Pequet* (1865), 17 La. An. 204; *Choteau v. Pierre* (1845), 9 Mo. 8; *Ott v. Soulard* (1846), Id. 581; *U. S. v. Turner* (1850), 11 How. (52 U. S.) 663. And the same is true of the laws in force in California and the Territories acquired from Mexico: *Payne v. Treadwell* (1860), 16 Cal. 220; *Bouldin v. Phelps* (U. S. C. C. N. Dist. Cal. 1887), 30 Fed. Rep. 547. For the reason stated the Supreme Courts of Indiana and Kentucky recognize certain statutes of the State of Virginia: *Henthorn v. Doe* (1822), 1 Blackf. (Ind.) 157; *Delano v. Jopling* (1822), 1 Littell (Ky.), 117, 417. In Tennessee, certain statutes of North Carolina: *Stevens v. Bomar* (1848), 9 Humph. (Tenn.) 546; *Green v. Goodall* (1860), 1 Cold. (Tenn.) 404; *Wilson v. Smith* (1825), 5 Yerg. (Tenn.) 879. On the proof of a foreign law, by the parol testimony of experts the jury must determine the existence of, and what that law is, but the question of its construction and effect is for the Court alone: *Kline v. Baker* (1868), 99 Mass. 253; *Holman v. King* (1844), 7 Met. (Mass.) 384; Story's *Conflict of Laws*, § 638; *Pickard v. Bailey* (1852), 26 N. H. 152. Where on its face a contract or other matter in dispute is to be governed by a foreign law, and no proof of the law is made, and it is not such as to be judicially noticed, the adjudicating tribunal will proceed upon the basis of its own laws, not being informed in what respect the foreign law differs;

or presuming, within certain restrictions, that it is identical. Thus, as a general rule, it is presumed that the common law prevails in each of the United States: *Monroe v. Douglass* (1851), 5 N. Y. 447; *Whitford v. Panama Railroad Co.* (1861), 23 Id. 465; *Copley v. Sandford* (1847), 2 La. An. 835; *Rape v. Heaton*, *supra*; Whart. on Ev., § 814; and that the common law is similarly in force in each State: *Wilson v. Cockrell* (1843), 8 Mo. 1; *Houghtaling v. Ball* (1858), 19 Id. 84; *Billingsly v. Dean* (1858), 11 Ind. 881.

Champerty, being an offence at common law, it is presumed, the contrary not appearing, to be against the law of another State: *Thurston v. Percival* (1828), 1 Pick. (Mass.) 415. As in Massachusetts, the giving of a promissory note is evidence of the payment of a pre-existing debt, the law will be presumed the same in Maine: *Ely v. James* (1877), 128 Mass. 36. If a contract made with reference to foreign laws and to be governed thereby, would be void or illegal by the law of the forum, the Court will not, for the mere purpose of defeating the contract, presume the foreign law to be the same; on the contrary, in the absence of proof, it will understand the contract to be valid by the foreign law: Bishop on Mar. & Div., § 412; Whart. on Ev., §§ 814, 1250; *Jones v. Palmer* (1844), 1 Doug. (Mich.) 879. Where the defence is usury, and the contract would be usurious under the domestic law, the Court will not presume the *lex loci contractus* is identical and so overthrow the contract: for the burden of proving the foreign law is on the defendant to establish his defence: *Champion v. Kille* (1863), 15 N. J. Eq. 476; *Cutler v. Wright* (1860), 22 N. Y. 472; *Davis v. Bowling* (1854), 19 Mo. 651.

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Lincoln, Neb.

(To be continued.)

STATUTES RELATING TO TELEPHONE COMPANIES.

(Continued.)

MINNESOTA repealed the Act of 1881 (Gen. Laws, extra session, chap. 68; note to p. 215, vol. 2, Gen. Stat. 1889) by an Act, approved March 8, 1887 (chap. 188, Gen. Laws, p. 225; Gen. Stat. vol. 2, p. 217), providing—

SECTION 1. Each and every telephone company, corporation, or association, partnership or person, owning or operating, or which shall hereafter own or operate, within this State, for hire or compensation, any telephone or telephone line or lines, the rate and manner of the taxation of which for any purpose, has not been fixed or prescribed by special charter granting such franchise, shall on or before the first day of February, one thousand eight hundred and eighty-eight, and annually thereafter, on or before the first day of February in each year pay into the treasury of this State two per centum of the gross earnings of said company, corporation, association, partnership, or person, earned upon the business done wholly in the State, during the year ending upon the first day of July, immediately preceding the day upon which payment shall be made as aforesaid, which payment shall be made in lieu of, and in full payment of, all taxes and assessments of every description, levied upon or payable by said company, corporation, association, partnership, or person, by virtue of any law of this State, upon all personal property, rights, privileges, immunities, or franchises, owned and used by said company, corporation, association, partnership, or person, in the operation and management of its, their, or his business, within this State: *Provided, however,* that any and all sums of money which may be paid out by such company, corporation, association, partnership, or person, as royalties, upon patented articles used in said business, shall be deducted from the gross receipts, and the two per centum shall be levied only upon the balance of such gross receipts, after the said amount so paid as royalty shall have been deducted.

SECTION 2. For the purpose of ascertaining the gross earnings aforesaid, each and every such telephone company, corporation, association, partnership, or person, doing business in this State as aforesaid, shall, on or before the first day of September, in the year of our Lord one thousand eight hundred and eighty-seven, and annually thereafter, on or before the first day of September of each and every year, make and transmit to the State Auditor of the State of Minnesota, in his office at the Capitol at St. Paul, a full and true report and statement under oath of the proper officers of said company, corporation, association, partnership, or of said person, of their said business as it existed on the first day of July, immediately preceding the making of such report, specifying:—

First. The gross receipts on all business done wholly within this State, during the year ending immediately preceding said first day of July.

Second. All sums of money paid out during said year, as royalties, upon all patented articles or instruments used by said company, corporation, association, partnership, or person.

SECTION 3. The property, books, records (accounts), papers, and proceedings, so far as they relate to the condition, operation, or management of said telephone companies, corporations, associations, partnerships, or persons, shall, at all times during business hours, be subject to the examination and inspection of the said State Auditor, and he shall have power to examine, under oath or affirmation, each and all directors, officers, managers, agents, and employes, of any such telephone company, corporation, association, partnership, or other persons, concerning any matter relating to the subject of such report.

SECTION 4. Every telephone company, association, corporation, partnership, or person, or any of their, its, or his officers or managing agents, who shall wilfully neglect or refuse to make, or furnish, any report required in this Act, at the time herein required, or who shall wilfully or unlawfully hinder, delay or obstruct said State Auditor in the discharge of his duties hereby imposed upon him, shall forfeit and pay a sum of not less than two hundred dollars, nor more than five hundred dollars, for such offence, to be recovered in a civil action upon complaint of said State Auditor, and in his name, for the use and benefit of the State of Minnesota; and every such telephone company, corporation, association, partnership, or person, and every officer, and managing agent thereof, whose duty it may be to make such report, shall be liable to a like penalty for every period of ten days it, he, or they shall wilfully neglect or refuse to make such report, and any person who shall, in any affidavit, report, statement, or examination, provided for or required in this Act, intentionally or knowingly swear falsely to any matter to which the same, or either of them, relate, shall be deemed to have committed the crime of perjury, and be punished accordingly.

SECTION 5. The State Auditor shall on or before the first day of January of each year immediately following the filing of such report or statement hereinbefore mentioned, make and file with the State Treasurer, a report showing the amount of taxes as payment due and payable from each and every such company, association, corporation, partnership, or person owning or operating any telephone or telephone lines within this State.

SECTION 6. For the purpose of securing to the State the payment of the aforesaid taxes or sums, the State shall have a lien upon each and all of the telephone lines and instruments for or on account of the operation of which such tax, sum, or per centum shall become payable, which said liens hereby created shall have and take precedence of any or all other liens, demands, decrees, and judgments upon or against said property, or against the party by which said tax, sum, or per centum shall be payable, and which lien hereby created may be enforced by the sale of any such property to which said lien may attach, by the State Treasurer, in the manner prescribed by section one hundred and thirty-one of chapter eleven of the General Statutes of eighteen hundred and seventy-eight, relating to telegraphs, and telegraph companies, or by other process of law.

MISSOURI provides at length, for the formation and regula-

tion of telephone companies (Rev. Stat. 1879, chap. 21, art. V., page 157)—

Sec. 874. Any number of persons, not less than five, being subscribers to the stock of any contemplated telephone or magnetic telegraph company, may be formed into a corporation, for the purpose of constructing, owning, operating, and maintaining lines of telephone or magnetic telegraph, upon complying with the following requirements: Whenever stock, to the amount of not less than twenty thousand dollars, shall have been subscribed, for the purpose of forming a telegraph company, or five hundred dollars for the purpose of forming a telephone company, the subscribers to such stock shall elect from among themselves such number of directors, not less than three nor more than thirteen, as they may determine, and shall severally subscribe articles of association, which shall set forth the name of the corporation, the amount of capital stock of the company, the number of directors, the amount of each share of stock, the number and names of the subscribers to the stock of the company, and the number of shares of stock taken by each subscriber, the location of the principal office or place of business of the company, and the names of its authorized agents thereat, which shall be verified by the affidavit of at least three of the subscribers thereto, and shall pay into the State treasury, fifty dollars for the first fifty thousand dollars, or less of its capital stock, and the further sum of five dollars for every additional ten thousand dollars thereof (as amended by Act of April 2, 1885, Laws, page 95).

Sec. 875. The articles of association shall be filed in the office of the Secretary of State, who shall record and carefully preserve the same in his office, and thereupon the subscribers, and the persons who from time to time, shall become stockholders in such company, and their successors, shall be a body politic and corporate, by the name stated in such articles of association, and shall have power to construct, own, operate, and maintain lines of telephone and magnetic telegraph, between such points as they may, from time to time, determine, and to make such reasonable charges for the use of the same as they may establish; and shall have power to lease or attach to their lines, other telephone or telegraph lines, by lease or purchase; and meetings of the stockholders or of the directors of such corporation may be held for the transaction of business, as well without as within this State. A copy of the articles of association, certified by the Secretary of State, or his deputy, under the seal of the State, shall be *prima facie* evidence of the incorporation of such company, and of the facts stated therein. Any such company, though its board of directors, with the consent of the persons holding the larger amount in value of the stock, shall have power to reduce its capital to any amount not below the actual cost of construction, and in like manner and with like consent, to increase the capital stock from time to time, as in their judgment may be necessary, not exceeding an amount, which, when fully paid up, shall be required for the business of the company, which consent shall be obtained in the manner prescribed by law.

Sec. 876. There shall be an annual election of directors, to serve for the ensuing year, notice of which, appointing the time and place, shall be given by the directors chosen, as provided by law, for the first annual election, and

thereafter by their successors in office; which notice shall be published, not less than twenty days previous thereto, in a newspaper published in the county, where the principal office of the company shall be situated. The directors shall hold their offices for one year, and until their successors are duly elected and qualified. They shall elect one of their number to be President of the company, and may appoint such other officers and agents as [may] be prescribed by the articles of association or by-laws of the company.

Sec. 877. No person shall be chosen a director who is not a stockholder, owning stock absolutely in his own right and qualified to vote at the election at which he is chosen, and all elections for directors shall conform to the requirements of law, governing private corporations.

Sec. 878. The board of directors may at any time, meet for the transaction of business, upon a call of the President of the company.

Sec. 879. Companies organized under the provisions of this article, for the purpose of constructing and maintaining telephone or magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures, along, and across any of the public roads, streets and waters of this State, in such manner as not to incommode the public, in the use of such roads, streets and waters.

Sec. 880. Such companies are also authorized to enter upon any land, whether owned by private persons, in fee, or in any less estate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation, for the purpose of making preliminary surveys and examinations with a view to the erection of any telephone or telegraph lines, and, from time to time, to appropriate so much of said lands as may be necessary, to erect such poles, piers, abutments, wires and other necessary fixtures for a telephone or magnetic telegraph, and to make such changes of location of any part of said lines, as may, from time to time, be deemed necessary, and shall have a right of access to construct said line, and, when erected, from time to time, as may be required, to repair the same; and may proceed to obtain the right of way, and to condemn said lands in the manner provided by law.

Sec. 881. No company shall have power to contract with any owner of land, for the right to erect or maintain a telephone or telegraph line over his lands, to the exclusion of the lines of other companies organized under the provisions of this article.

Sec. 882. Any company, incorporated as herein provided, may contract, own, use, and maintain any line or lines of telephone or magnetic telegraph, whether wholly within or wholly, or partly, beyond the limits of this State, and shall have power to lease or attach to the line or lines of such company, other telephone or telegraph lines, by lease or purchase, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining their line or lines, upon such terms as may be agreed upon between the directors or managers of the respective corporations, and may own and hold any interest in such line or lines, or become leasees thereof, on such terms as the respective corporations may agree.

Sec. 883. It shall be the duty of every telephone or telegraph company,

incorporated or unincorporated, operating any telephone or telegraphic line in this State, to receive dispatches from and for other telephone or telegraph lines, and from or for any individual, and upon payment or tender of their usual charges for transmitting dispatches, as established by the rules and regulations of such telephone or telegraph line, to transmit the same with impartiality and good faith, under a penalty of one hundred dollars for every neglect or refusal so to do, to be recovered, with costs of suit, by civil action, for the benefit of the person or persons or company sending or desiring to send such dispatch.

Sec. 884. Where the person sending the dispatch desires to have it forwarded over the lines of other telephone or telegraph companies, whose termini are respectively within the limits of the usual delivery of such companies, to the place of final destination, and shall tender to the first company the amount of the usual charges for the dispatch to the place of final delivery, it shall be the duty of the company to receive the same, and, without delaying the dispatch, to pay to the succeeding line the necessary charges for the remaining distance, and it shall be the duty of the succeeding line or lines to accept the same, and forward the dispatch in the same manner as if the person sending the same had applied to the agent or operator of such line or lines in person, and paid to him the usual charges ; and for omitting so to do, the company or companies owning or operating such line or lines shall severally be liable to the penalty prescribed in section eight hundred and eighty-three.

Sec. 885. In all cases where application is made to any telephone or telegraph company, or the operator, agent, clerk or servant thereof, to send a dispatch, it shall be the duty of such operator, agent, clerk or servant who may receive dispatches at that station, plainly to inform the applicant, and if required by him, to write upon the dispatch, that the line is not in working order, or that the dispatches already on hand for transmission will occupy the time, so that the dispatch offered cannot be transmitted within the time required, if the facts be so ; and for omitting so to do, or for intentionally giving false information to the applicant, in relation to the time within which the dispatch offered may be sent, such operator, agent, clerk or servant, and the company by which he is employed, shall incur a like penalty as in section eight hundred and eighty-three.

Sec. 886. If any officer, manager, agent or operator of any telephone or telegraph line, operating in this State, or any other person, shall knowingly transmit by such telephone or telegraph line, any false communication or intelligence, with intent to injure any one, or to speculate in any article of merchandise, commerce or trade, or with intent that another may do so, or shall knowingly send or deliver any dispatch that is forged or not authorized by the person whose name purports to be signed thereto, shall, on conviction thereof, in the Court having criminal jurisdiction in the proper county, be liable to the same penalty as is provided in section eight hundred and eighty-three.

Sec. 887. Every telephone or telegraph company now organized, or which may hereafter be organized, under the laws of this State shall be liable for special damages occasioned by the failure or negligence of their operators or servants, in receiving, copying, transmitting or delivering dispatches ; and for

the disclosure of any of the contents of any private dispatches to any person other than to him to whom it was addressed, or to his agent, they shall be liable to the sender of the dispatch and to the person to whom it was addressed, in the sum of fifty dollars to each, recoverable by an action before a justice of the peace, and for all special damages in addition thereto.

SEC. 888. The mayor and aldermen, or board of common council of any city, and the trustees of any incorporated town through which the lines of any telephone or telegraph company are to pass, may, by ordinance or otherwise, specify where the posts, piers, or abutments shall be located, the kind of posts that shall be used, the height at which the wires shall be run; and such company shall be governed by the regulations thus prescribed; and after the erection of said telephone or telegraph lines, the said mayor and aldermen, or board of common council, and the trustees of any incorporated town, shall have power to direct any alteration in the location or erection of said posts, piers, or abutments, and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such alteration.

SEC. 889. Any person who shall unlawfully and intentionally injure, molest or destroy any of the lines, posts, piers, abutments, or other material, or property, pertaining to any line of telephone or magnetic telegraph, erected in this State, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment, at the discretion of the Court having cognizance thereof.

SEC. 890. Any telegraph company now organized, or which may hereafter be organized under the laws of this State, may at any regular meeting of the stockholders thereof, by vote of persons holding a majority of the shares of the stock of such company, unite or consolidate with any other company or companies now organized, or which may hereafter be organized, under the laws of the United States, or of any State or Territory, by consent of the company with which it may consolidate or unite, and such consolidated company so formed, may hold, use and enjoy all the rights and privileges conferred by the laws of Missouri on companies separately organized under the provisions of this article, and be subject to the same liabilities.

SEC. 891. All corporations formed under this article shall possess all the powers and privileges granted to corporations by article one of this chapter, relating to the general powers of private corporations, and be subject to all the provisions thereof except as herein otherwise provided.

JOHN B. UHLE.

(To be continued.)

RECENT AMERICAN DECISIONS.

Supreme Court of Wisconsin.

GILLETT v. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

Where a mortgagee, under the terms of his mortgage, took out an insurance on the mortgaged property, in the name of the two mortgagors, and containing a clause that additional insurance, obtained by the insured should avoid this policy, unless the original insurer's consent be written on the original policy, one of the mortgagors cannot take an additional policy in his own name; the interests covered by the policies are identical, and the latter policy transgresses the condition of the former policy and avoids it.

If the policy had been in the name of the mortgagee, the difference in the person insured would have been radical and controlling, and the additional insurance obtained by mortgagor would not have avoided the former policy.

APPEAL from the Circuit Court of Marathon County.

Plaintiff held a mortgage on certain real estate of M. A. York & Co., a firm consisting of Mrs. M. A. York and her husband, Solomon. The mortgage was given by that firm to secure an indebtedness of \$2000, which still remains unpaid. The principal value of the mortgaged premises was in a saw-mill situated thereon, and certain machinery and fixtures therein. This mortgage contained a covenant by the mortgagors to keep the buildings on the mortgaged premises insured for at least \$2500, and to assign the policies to the plaintiff as collateral security for the mortgage debt, and, in default thereof, the plaintiff was authorized to effect such insurance, the costs and expenses of which to be added to and become a part of the mortgage debt. The mortgagors having failed to obtain such insurance, the plaintiff, on September 7, 1888, procured from the defendant company the policy in suit. This policy insured M. A. York & Co. against loss of the insured property or damage thereto by fire, for one year, in the sum of \$1000. It contained a stipulation that the same should be void "if the insured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon." It permitted \$2000 total concurrent insurance, and provided, "loss, if any, under this policy, payable to J. D. Gillett, Esq., as his interest may appear." In March,

1884, Mrs. York, without the consent of the defendant company, procured further insurance on substantially the same property, in several other insurance companies, amounting in the aggregate to \$4000. August 16, 1884, the insured property was destroyed by fire. In November, 1884, plaintiff furnished defendant company with proofs of such loss, in which such insurance of \$4000, obtained by Mrs. York, was stated. The defendant refused to pay the insurance written in the policy, and the plaintiff brought this action to recover it. The foregoing facts were conclusively established by the pleadings and the testimony on the trial, to which further reference is made in the opinion. The circuit judge directed the jury to return a verdict for the defendant, which they accordingly did. A motion for a new trial was denied, and judgment entered for the defendant pursuant to the verdict. The plaintiff appealed from the judgment.

Silverthorn, Hurley & Ryan, for appellant.

Cate, Jones, & Sanborn, for appellee.

LYON, J. Dec. 22, 1888. (*After stating the facts as above.*) To strengthen his security for the mortgage debt by an insurance upon the mortgaged property, two methods were open to the plaintiff. He might have taken a policy directly to himself, insuring his mortgage interest alone, if he could find an insurer willing to issue such a policy; or he could obtain a policy running to the mortgagors, stipulating that the loss, if any, should be paid to him as his interest should appear. Perhaps such a policy would not be an insurance of the mortgage interest, as such, but probably would cover such interest. Either mode would protect the plaintiff's security under his mortgage, but with this difference: had the policy run to himself alone, insuring only his mortgage interest, it would not be defeated by an unauthorized insurance upon the same property, obtained by the mortgagors, while a policy running to the mortgagors, insuring the property generally (as in the present case), would be defeated by such unauthorized insurance.

The plaintiff did not stipulate with the agent of the defendant company, Mr. Huntington, for a policy to himself,

insuring only his mortgage interest. The only testimony on the subject was given by the plaintiff himself, and is as follows: "I applied to Mr. Huntington for the insurance on this property after the mortgage was executed. I received this policy upon the application." In answer to the question by his own counsel, "At the time when you applied to Mr. Huntington for this insurance did you state to him what interest you had in the property?" he further testified: "I think I did tell him that I had a mortgage on the property, and wanted to insure my interest in it." He further testified that he paid the premium for such insurance. Thus, it is undisputed that the plaintiff applied for an insurance upon the mortgaged property to secure his interest therein under his mortgage, without any agreement or reservation as to its form or the stipulations it should contain. The agent issued the policy in suit upon such application, which gives the plaintiff the security he desired. The plaintiff accepted it as a compliance with his application, and held it nearly a year before the property was burned, without making any objection that it did not comply with the original parol contract for the insurance. We think it too late for the plaintiff to be now heard to allege that the policy does not contain the terms of the contract of insurance which the parties made, even did the testimony tend to show (which it does not), that a parol agreement was in fact made to the effect that the policy should issue to the plaintiff, insuring the mortgage interest alone.

Much weight is given to the argument of counsel for the plaintiff to the fact that the plaintiff paid the premium for the insurance. But this fact must be considered in connection with the covenant in the mortgage that the mortgagors should insure the property, and, failing to do so, that the plaintiff might insure the same, and that the expense thereof should be added to and constitute a part of the mortgage debt. So, when the plaintiff says he paid the premium for the insurance, the effect of his testimony is that he thereby increased the mortgage debt by the sum so paid. Moreover, the above covenant clearly contemplates an insurance of the mortgagors' interest in the property, which could only be

effected by a policy running to them. The covenant is ample authority to the plaintiff to insure the property in their names.

Having thus determined that the plaintiff is bound by the stipulations in the policy in suit, it necessarily results that the obtaining by the mortgagors of any unauthorized insurance on the same property invalidates the policy, under the stipulation therein against additional insurance without the consent of the defendant company. Has this stipulation been violated? Mrs. York, one of the owners of the property, obtained policies in her name alone in March, 1884, on substantially the same property, for \$4000, without the consent or knowledge of the defendant company. Nothing appears adverse to the validity of such additional insurance. The policy in suit permitted concurrent insurance to the amount of \$2000 only. Had this insurance been effected by M. A. York & Co., it would doubtless have defeated the policy. It may be conceded that these policies for \$4000 insured only the interest of Mrs. York in the insured property, which, presumably, is one-half thereof.

It is maintained by counsel for plaintiff that, because the policies were obtained by and issued to Mrs. York alone, the \$4000 insurance is not a breach of the stipulation against other insurance. The rule invoked to support this proposition is thus laid down in 2 Wood on Ins. § 377: "In order to amount to other insurance, the interests covered by the policies must be identical." We think such interests are identical in the present case. The policy in suit insures the interest of Mrs. York in the insured property, and the additional policies issued to her insure the same interest. We find no established rule that because Solomon York's interest in the property was insured by the policy in suit, and not by the \$4000 policies, the latter policies do not constitute double insurance. In *Insurance Co. v. Hulman* (1879), 92 Ill. 145, it was held that any unauthorized insurance by a wife, violated a stipulation in a former policy on the same property, issued to her and her husband. Such we think the law. Several distinctions between the Illinois case and the one under consideration are noted by counsel, some of which are real and

some are not, but we think these do not affect the applicability of the rule, there laid down, to this case. The case of *Insurance Co. v. Foster* (1878), 90 Ill. 121, is relied upon as holding a different rule. The case is this: Foster held a mortgage on certain property, executed by B. He obtained an insurance upon the property, paid the premium, and, without the knowledge or authority of B., took a policy in their joint names; the policy containing the usual stipulation as regards other insurance. B. had obtained another insurance in violation of the stipulation. The Court held that, under the circumstances, the insurance was solely for F.'s benefit, and that the policy was not invalidated by such act of B. The difference between the two cases is, the policy in the Illinois case ran to Foster, the mortgagee, and, in legal effect, as the Court held, to him alone, while here the policy runs to the mortgagors alone. This difference is radical and controlling, and calls for the application in this case of a different rule of law. Another case, much relied upon by counsel for the plaintiff, may properly be noticed in this connection. It is that of *Pitney v. Insurance Co.* (1875), 65 N. Y. 6. Norman and George N. Pitney were joint owners of the insured property, which was a quantity of wool. Norman obtained a policy in his own name. Afterwards he told the agent that he had forgotten to mention the interest of George, and his intention to have that interest insured. The agent attempted to accomplish that purpose by inserting in the policy these words: "In case of loss, if any, one-half payable to George N. Pitney, as his interest may appear." Under the circumstances, it was held that the interest of George N. in the wool was covered by the policy. That case does not hold that a breach of covenant against further insurance would not have resulted, had either of the owners of the wool insured his interest therein in his own name without the consent of the company. Hence the case is not in point here. That case was decided by a bare majority of the commission of appeals: LOTT, Ch. C., and EARL, C., dissenting. We should hesitate to indorse all the doctrines there asserted without further examination.

We conclude that the policy in suit was invalidated by the

unauthorized insurance obtained by Mrs. York, and hence that the Court properly directed a verdict for the defendant. The judgment of the Circuit Court is affirmed.

It is unnecessary to cite authorities to the proposition, that a condition in a policy, prohibiting the insured from insuring the same property in another company, or limiting the amount of insurance which may be obtained elsewhere, is valid. And it is equally well settled, that a subsequent insurer may relieve itself from liability, by a stipulation in its policy, if there is existing insurance, which is not disclosed and assented to.

Rule of construction.—Conditions in contracts which provide for a forfeiture, are not looked upon with favor, especially when there has been a performance by one of the parties. But the same degree of jealousy is not entertained by all the Courts, of the condition prohibiting other insurance, as of most of the conditions which make the modern insurance policy such a prolix and complicated instrument. This distinction rests on the ground that the condition is a reasonable one, a protection against fraud, and in support of a sound public policy: *Turner v. Meridian Co.* (1883), U. S. C. Ct., D. R. I., 16 Fed. Repr. 454. Being a known part of the contract, the condition will receive a fair and reasonable interpretation, according to the terms and obvious import of the language used: *Carpenter v. Providence Co.* (1842), 16 Pet. (41 U. S.) 495, 512. A precisely literal or inflexibly stringent interpretation against the insurer, would often be inconsistent with public policy, reason and justice, and not required by the wise maxim that ambiguities should be construed most strongly against the party who framed the instrument in which they are used:

Manhattan Co. v. Stein (1869), 5 Bush (Ky.), 652. But it will fully appear in the course of this note, that this view is not satisfactory to some Courts. For the present, let it suffice to observe that the rule stated, does not apply if there is any uncertainty in the language used. Ambiguous stipulations, prohibiting other insurance, are restrictions on the right of the insured to redress against the insurer. They impose a burden on the insured, for the insurer's benefit, and must therefore be strictly construed: *Warwick v. Monmouth County Mut. Co.* (1882), 44 N. J. L. 83. The common-law rule of strict construction in regard to forfeiture, is wholesome and sound. "Parties may contract very much as they choose, so long as they keep within the law; and it may be assumed there is some reason for each condition adopted. But there is great hardship, in allowing parties to keep money which they have not fairly earned, and great wrong, in favoring blind conditions, or those which parties do not fully understand, where they are not in actual fault. A close construction is the only just one:" *Westchester Co. v. Earle* (1876), 33 Mich. 143.

A condition in a policy, limiting the amount for which the defendant should be liable, expressed that every person "insuring," was required to give notice of any other insurance "effected." This was held to include subsequent, as well as prior insurance: *Warwick v. Monmouth County Mut. Co.*, *supra*. A requirement that notice shall be given "of any insurance made," applies to subsequent as well as prior insurance. The judge who wrote the opinion in

this case indicated that his conviction was otherwise; the ruling was made in deference to authority, it having been so held in *Harris v. Ohio Co.* (1832), 5 Ohio, 466; *Stacey v. Franklin Co.* (1841), 2 W. & S. (Pa.), 506, 547. It was expressed that the policy "shall become void, if any other insurance be made, which, together with this insurance, shall exceed," etc. This related to subsequent insurance only: *Mussey v. Atlas Co.* (1856), 14 N. Y. 79. The other insurance contemplated by the usual condition, is insurance effected in another company, after the policy issued, or if previously existing, not then known to the insured. Insurance which is disclosed by the application is not within the reason of the condition: *Lockwood v. Middlesex Mut. Co.* (1880), 47 Conn. 553.

Plaintiff warranted that his title to the property insured was derived from a contract, and in reply to the question, "how much insured in other companies?" answered "none." This was interpreted to mean that plaintiff had no insurance in other companies. The question was not meant to elicit information concerning insurance by another, as plaintiff's vendor: *Sprague v. Holland P. Co.* (1877), 69 N. Y. 128.

Who is the insured?—The policy was to the owner of the property, and prohibited other insurance "on the interest hereby insured." The property was seized at the instance of creditors, and the officer who had the custody of it, insured it for their benefit. The insurance so effected, was not prohibited: *Marigny v. Home Mut. Co.* (1858), 13 La. An. 338. A warranty of no other insurance, made by the consignor of a vessel, who had obtained insurance on its freight, is not broken because the consignee, who has accepted a draft against such freight,

without the knowledge of the consignor, makes an insurance thereon: *Williams v. Crescent Mut. Co.* (1860), 15 La. An. 65.

A policy to a mortgagor, contained authority for an assignment of it to a person named, who was in fact mortgagee of the property, but was not so described. The mortgagor obtained another policy subsequently, which was to be void, if prior insurance existed by the insured on the property thereby insured. The first policy was never in fact assigned, but this was considered immaterial, and it was ruled that it covered the interest of the mortgagor, and the second policy, not containing the required consent, was void: *Carpenter v. Providence Co.*, *supra*. A policy to mortgagors, the loss being payable to their mortgagee, insures the former only, and a subsequent policy, obtained contrary to its conditions, by one of the mortgagors, avoids it: *Continental Co. v. Hulman* (1879), 92 Ill. 145; *Friemondorf v. Watertown Co.* (1879), 9 Biss. U. S. C. Ct., N. D. Ill. 167; *Lias v. Roger Williams Co.* (1880), U. S. C. Ct. D. N. H.; 8 Fed. Repr. 187.

An equitable mortgagor, who insures the whole property under authority from the mortgagee, is within the condition, prohibiting other insurance by the insured. The Court observed: It is the thing, and not any particular form of doing it, which is guarded against, and that thing is such subsequent insurance on the property as would lessen the interest of the insured in its preservation; and this includes all subsequent insurance which, when recovered, will go to the benefit of the insured in the first policy. And so, if the mortgagee did in fact, cover his own special interest as mortgagee, and the mortgagor agreed to pay the expense of obtaining the insurance, then, although

the mortgagee would have a lien on the insurance money as security for his debt, yet the mortgagor could compel its application to the payment of his debt, and any surplus would belong to him. Hence subsequent insurance obtained by the mortgagor, is effected by the insured: *Helbrecht v. American Co.* (1852), 1 Curt. (U. S. C. Ct.) 193, 201. And so a policy to a mortgagor, assigned by him to the mortgagee, is avoided by one subsequently obtained by the purchaser of the mortgagor's rights: *Moulthrop v. Farmers' Mut. Co.* (1879), 52 Vt. 123.

If there is no agreement between the mortgagor and the mortgagee whereby the former was to be interested in a policy obtained by the latter, a previous policy to the mortgagor is not avoided by one in the mortgagee's favor: *Guest v. New Hampshire Co.*, Sup. Ct. Mich., 1887. A policy obtained by a mortgagee in favor of the mortgagor, without the knowledge of the latter, does not avoid one procured by the mortgagor, without notice to the insurer of the former: *Nichols v. Fayette Mut. Co.* (1861), 1 Allen (Mass.) 63. Insurance upon a mortgagor's interest does not defeat a subsequent policy on the same property, in favor of the mortgagee and the mortgagor, the loss being payable to the former, and the latter not being aware of the existence of the second policy: *Westchester Co. v. Foster* (1878), 90 Ill. 121. If the mortgagor's application for insurance notifies the insurer that the property is mortgaged, and that the mortgagee has the right to insure it to an amount stated, and if, pursuant to such right, without the mortgagor's knowledge, the mortgagee obtains a policy, it is not other insurance: *Carpenter v. Continental Co.* (1886), 61 Mich. 635.

A policy upon property, the legal

title to which was in the mortgagor's assignee, was payable to the mortgagee. Without the consent of either of these, the mortgagor insured the property in his own name as owner. Such policy did not affect the first one. It was obtained by a stranger, on his own interest, and could not be controlled or prevented by the mortgagee nor the mortgagor's assignee: *Wheeler v. Watertown Co.* (1881), 131 Mass. 1. The insurance was for the benefit of the mortgagee of the property, and the policy contained the usual prohibition against other insurance, but provided that no sale or transfer of the property insured should affect the mortgagee's right. A second mortgage was executed; after entering, for the purpose of foreclosing, the second mortgagee insured the property without the consent of the first insurer. This insurance did not affect the rights of the first mortgagee: *City Five Cent Bank v. Pennsylvania Co.* (1877), 122 Mass. 165.

The mortgagor was insured, the loss being payable to the mortgagee: Subsequently the mortgagee insured the same property, without defendant's knowledge, the loss being payable to him. In reply to the point that this constituted double insurance, the Court observes: "The answer to this is that the insured, the mortgagor, did not procure the further insurance, that he did not know of it until after the loss, and that the mortgagee was not his agent, in any sense, to procure such insurance. It is true that the mortgage contained a clause, providing that the mortgagor should keep the mortgaged buildings insured, and assign the policy to the mortgagee, and that in case of default on his part, the mortgagee might procure such insurance at his expense, and add the amount paid therefor to his mortgage. But that clause could not operate until

there was default on the part of the mortgagor, and he could be put in default only upon refusal or neglect to procure the insurance, after some sort of notice or demand. Besides, the mortgagee, in procuring that insurance, acted for himself and in his own interest; and hence his act in procuring it, cannot be so far regarded as the act of the mortgagor, as to violate the prohibition against other insurance. The mortgagor did not ratify the mortgagee's act, so as to be bound by it, in making proof of the loss: "*Titus v. Glen's Falls Co.* (1880), 81 N. Y. 410; *Doran v. Franklin Co.* (1881), 86 Id. 635.

A policy to a mortgagee, as such, is not affected by an insurance of the mortgagor's interest, though it be for the benefit of the mortgagee, if it was procured without his knowledge or request: *Johnson v. North British Co.* (1872), 1 Holmes (U. S. C. Ct.) 117.

Other insurance by the insured or his assigns, was prohibited. The prohibition did not extend to an absolute purchaser of the property insured, who did not become the assignee of the policy according to its terms, nor to one who acquired a lien thereon, or other interest by way of mortgage: *Holbrook v. American Co.*, *supra*.

Property covered by a policy admitted to have been made on account of another than the insured, was assigned in trust for the creditors of the party beneficially interested. The trustees named in the assignment, effected other insurance without giving notice. This avoided the first policy: *Leavitt v. Western Co.* (1844), 7 Rob. (La.) 351.

A policy to tenants in common of personal property is avoided by a subsequent one, to one of such tenants, no mention being made of the joint ownership: *Pitney v. Glen's Falls Co.* (1875), 65 N. Y. 6; *Hartridge v. Dwell-*

ling House Co., Iowa Sup. Ct., Oct. 1888. A part owner of a vessel has no authority, by reason of such ownership, to insure the interests of his co-owners; hence a policy upon the whole vessel taken by him in his name, without previous authority or subsequent ratification by the other owners, is invalid, except as to the interest of him who procured it: *Knight v. Eureka Co.* (1875), 26 Ohio St. 664. But a warranty against other insurance is broken when part of those who made it obtained such insurance for their own benefit: *Musey v. Atlas Co.* (1856), 14 N. Y. 79.

The naked legal title, to the property insured, was in the trustee under a will. By the terms of the will and a division of the estate, some of the devisees had become entitled to an undivided portion thereof. The interest of one of these was insured. Subsequently the trustee, as such, and without stating for whom, insured the same property without the knowledge or consent of the person who was already insured. Parol evidence was received to show that the later policy was intended to apply only to the uninsured interest: *Franklin Co. v. Drake* (1841), 2 B. Mon. (Ky.), 47.

A policy obtained by a vendee, and assigned to his vendor, pursuant to their contract, avoids a policy subsequently obtained by the vendor for his own benefit: *Nere v. Columbia Co.* (1842), 2 M'Mull. (S. C.), 220. But if the vendee is in possession of the property, under a valid contract for a deed, part of the purchase-money being unpaid, a policy to the vendee is not avoided by a previous one issued to the vendor, no assignment of such policy being made to the purchaser before loss. The policy held by the vendor protected his interest in the property: *Etna Co. v. Tyler* (1836), 16 Wend. (N. Y.) 385; affirming *Tyler*

v. *Ætna Co.*, 12 Id. 507. Insurance by a vendor does not constitute a breach of warranty by his vendee, that there is no insurance: *Sprague v. Holland P. Co.*, *supra*. An insured stock of goods was mingled with another insured stock, acquired by purchase. The vendor's policy, with the insurer's consent, was assigned to the vendee, and the latter's policy was changed to cover his original stock in the place to which it was removed. The vendee's policy was avoided: *Walton v. Louisiana Co.* (1842), 2 Rob. (La.) 563; *Washington Co. v. Hayes* (1867), 17 Ohio St. 432.

One to whom a policy is payable in case of loss, and who has become, with insurer's assent, the assignee of the interest of the insured in the policy, is only entitled to receive what the insured could recover, and the latter's act in procuring other insurance bars the assignee's right to recover: *Hale v. Mechanic's Mut. Co.* (1856), 6 Gray (Mass.), 169.

What property is insured.—The words "property hereby insured," refer to the interest of the insured in the property: *Jackson v. North British Co.* *supra*. Neither the policy of the law nor the contract of insurance, when such words as are quoted are employed in the latter, forbids as many several insurances upon the same property as there are separate insurable interests. The policy of the law is to prevent insurances in excess of the value of the thing insured in favor of the same party and against the same risks; and hence the restrictive clause, whatever its form, unless its language clearly demands a different interpretation, should be held operative to this extent only, and the term property, in such clause, means the interest of the assured: *Springfield Co. v. Allen* (1871), 43 N. Y. 389.

The owner of an insured mill leased it for a term of years. While in possession, the lessee took out part of the old machinery and substituted new in its place, at his own expense. He insured such new machinery and assigned the policy to the lessor as security for a loan. The insurances were upon different property: *Planter's Mut. Co. v. Rowland* (1886), 66 Md. 236.

It was formerly held in New York, where a specific parcel of property was insured, and the same property was covered by another policy, which also included other property of the same assured, that the latter was to be thrown out of view, and did not constitute other insurance: *Howard Co. v. Scribner* (1843), 5 Hill (N. Y.), 298. This case was followed in *Sloat v. Royal Co.* (1865), 49 Pa. 14. The first policy in the last case was on a building, the second one was on the same building, and the shafting, machinery, belting, etc., contained in it. The insurance was held not to be double. The contrary rule is now established in New York: *Ogden v. East River Co.* (1872), 50 N. Y. 388; and in Ohio: *Phoenix Co. v. Michigan, etc. R. R. Co.* (1875), 28 Ohio St. 69.

No person, whose property was insured by defendant, was "allowed to insure the same, or any property connected with it," elsewhere. The property covered by the policy was a store building. It was ruled that the stock in trade therein was not "connected" with the building: *Jones v. Maine Mut. Co.* (1841), 18 Me. 155. Insurance on such a stock is not contrary to a condition prohibiting other insurance on any house or building: *Illinois Mut. Co. v. O'Neile* (1851), 13 Ill. 89.

A policy, covering a stock of goods, divided the whole amount for which it was written, into two classes, and

provided that if the assured "shall hereafter make any other insurance on the hereby insured premises," without giving notice, it should be void. This was taken to mean, that if any part of the goods mentioned was subsequently insured, the whole policy should become void: *Associated Firemen's Co. v. Assum* (1853), 5 Md. 165.

When is there other insurance?—Where it is sought to enforce a forfeiture, because of a subsequent policy, it must appear that such policy was delivered, by the insurer to the insured, with the intention that it should take effect as its contract, and was accepted by him as a contract then binding: *Continental Co. v. Horton* (1873), 28 Mich. 173.

If a policy is surrendered, the surrender to take effect at a time stated, it is of no force after such time, though it may not be discharged by the company until a later day: *Atlantic Co. v. Goodall* (1857), 35 N. H. 328; *Hadley v. New Hampshire Co.* (1875), 55 Id. 110. If one who is insured surrenders a policy to an agent of the company which issued it, such agent having previously taken the surrender of policies and had them cancelled, his acts in this regard having been approved by his principal, the policy is of no force from the time it is surrendered, although the company declined to repay any part of the premium, the agreement between the agent and the insured not providing for the return of any specific sum. The subsequent taking of such policy from the agent by the insured, after a loss, did not revive it: *Train v. Holland P. Co.* (1875), 62 N. Y. 598. This case was again before the Court on a different state of facts, and is reported (1877) in 68 N. Y. 208.

It was fully understood and agreed that an existing policy should be can-

celled, if the one in suit was taken. This understanding was carried into effect by an act which, if not actually before the manual reception of the policy issued by defendant, was substantially contemporaneous. The cancellation was one of several steps which were to be taken to complete the second insurance, and whether taken a few minutes or a few hours before or after any other step necessary to effect a completed contract, was immaterial, if all were taken substantially at the same time and before the transaction was closed: *Continental Ins. Co. v. Horton* (1873), 28 Mich. 173.

A broker obtained \$15,000 insurance for the plaintiff, distributed in a number of companies. Defendant's policy showed the total insurance, and prohibited in the usual terms, other insurance. Subsequently the agent of one of the companies gave such broker written notice that its policy for \$3000 was cancelled. The broker then obtained a policy for \$1500 in another company. It did not appear that the policy which was cancelled reserved the power to the company which issued it to cancel it, or that there was any agreement of the parties to that effect, and plaintiff showed that he, personally, never consented to the cancellation, and no authority to do so was shown to have been given the broker. His agency to procure the insurance implied no authority to terminate it. Hence it did not appear but that the cancelled policy was a valid and subsisting contract of insurance when the policy for \$1500 was obtained: *Rothschild v. American C. Co.* (1881), 74 Mo. 41.

Defendant, in an action upon his premium note, set up that when the policy for which the note was given was applied for, he had insurance in another company, the fact concerning

which was not endorsed on such policy. The first was surrendered after the second was obtained. The evidence tended to show that it was understood and agreed by the parties to the second policy, that it was not to be in effect until the first was surrendered, and that neither of them contemplated double insurance. The defendant was held liable: *Atlantic Mut. Co. v. Goodell* (1854), 9 Post. (N. H.) 182; *a. c.* (1857), 35 N. H. 328.

As intimated in the second paragraph of this note, there is a wide difference of opinion held as to the effect to be allowed the usual clause prohibiting other insurance. This variance of views grows out of the construction given to the word "insurance." What may be called the New England view is, that the insurance contemplated by the first insurer is a contract which is valid, legal, and enforceable, and that a subsequent policy, payment of which cannot be compelled, is not within the condition. This was first held in *Jackson v. Massachusetts Mut. Co.* (1839), 23 Pick. (Mass.) 418. The doctrine is well established in Massachusetts: *Clark v. New England Co.* (1850), 6 Cush. (Mass.) 342; *Hardy v. Union Mut. Co.* (1862), 4 Allen (Mass.), 217; *Wheeler v. Wattertown Co.* (1881), 131 Mass. 1; *Thomas v. Builders' Mut. Co.* (1875), 119 Id. 121. It was declared in Pennsylvania in 1841: *Stacey v. Franklin Co.*, *supra*. In New Jersey in 1854: *Schenck v. Mercer County Mut. Co.* (1854), 24 N. J. L. 447; *Jersey City Co. v. Nichol* (1882), 35 N. J. Eq. 291. In Maine, by a *dictum*, in *Philbrook v. New England Mut. Co.* (1853), 37 Me. 137; and fully in *Lindley v. Union Farmers' Mutual Co.* (1876), 65 Id. 368. In Ohio in *Knight v. Eureka Co.*, *supra*. In Virginia in *Sutherland v. Old Dominion Co.* (1878), 31 Grat. (Va.)

176. In New Hampshire in *Gale v. Belknap County Co.* (1860), 41 N. H. 170; *Gee v. Cheshire County Mut. Co.* (1874), 55 Id. 65. By Judge DILLON in *Allison v. Phoenix Co.* (1873), 3 Dill. (U. S. C. Ct. D. Iowa), 480.

An Indiana case (*Rising Sun Co. v. Slaughter* (1863), 20 Ind. 520) is usually cited as being in accord with the cases referred to. The rule there laid down is that a totally invalid insurance is not within the prohibition. The case was ruled on the erroneous assumption that, because the agent of a foreign company had not complied with the statute concerning such companies, its policy was utterly void. The present rule in Indiana is stated *infra*.

The validity of the subsequent policy is to be determined by the facts which existed before the loss occurred. The prior insurer is not injuriously affected by what subsequently transpired between the company which issued the second policy and the insured, although such company paid the loss: *Hardy v. Union Mut. Co.*, *supra*; *Thomas v. Builders' Mut. Co.*, *supra*; *Lindley v. Union Mut. Co.*, *supra*; *Fireman's Co. v. Holt* (1878), 35 Ohio St. 189.

If the policy which increased the insurance beyond the amount covenanted to be taken by the insured in a prior policy is void at the time of loss, it does not constitute a breach of the covenant; but if it is voidable only by reason of the breach of a condition enabling the insurer to avoid it, but which it has waived, there is a breach: *Mitchell v. Lycoming Mut. Co.* (1865), 51 Pa. 402. If the policy, which was obtained contrary to the conditions of another contract, was not in force when the loss occurred, the condition against other insurance is not violated: *N. E. F. & M. Co. v. Schettler* (1865), 38 Ill. 166; *Ober-*

meyer v. Globe Mut. Co. (1869), 43 Mo. 573. In the last case the insured intended to meet the conditions of the policy sued upon. He received notice that one of his policies would be cancelled at a certain time, and procured another of equal amount; the cancellation did not take effect until the one so procured had been in force a month. When the loss occurred such policy had been discharged. A contract, entered into under a mutual mistake as to the existence of other insurance, does not avoid a prior policy, the policy so contracted for never having been delivered: *Wilson v. Queen Co.* (1881), U. S. C. Ct. W. D. Pa., 5 Fed. Repr. 674. A policy may be cancelled without the consent of the company which has issued another policy on the same property. The insured is not bound to have a policy declared invalid, before he may be relieved from liability for a forfeiture, because he obtained other insurance: *Hand v. Williamsburgh Co.* (1874), 57 N. Y. 41.

A condition providing for a forfeiture, whether other insurance, if taken, be valid or not, is void, it seems, for repugnance to the nature of the contract evidenced by the policy, because it is against an attempt resulting in total failure. A policy with such a condition does not become immediately void upon obtaining another, but subsists so as to render the latter double insurance: *Gee v. Cheshire Mut. Co.*, *supra*. But see *infra*.

The second policy contained a printed condition that it should be void if any other insurance was taken on the property covered by it, and was not indorsed. A written clause in it was in these words: "Other insurances permitted without notice, until required." Considered in connection with other provisions in the policy, this writing was held applica-

ble to prior as well as to subsequent insurance, and was not avoided by prior insurance, but itself avoided a policy existing when it issued, and containing similar language: *Kimball v. Howard Co.* (1857), 8 Gray (Mass.) 33.

The opposing view was first declared by the Supreme Court of the United States in 1842, when it was ruled that a policy obtained by misrepresenting material facts, is not void *ab initio*, but merely voidable, and may be avoided by the company which issued it upon due proof of the facts; but, until so avoided, it must be treated for all practical purposes as a subsisting policy. Notice of it must be given the other insurer: *Carpenter v. Providence Co.*, *supra*. Referring to the cases which declare otherwise, the Court observes that they are distinguishable from this case. Questions of this character are questions of general commercial law, and depend upon construction, and are not regulated by local policy or customs. Judge DILLON was of the opinion that this case does not establish that a second policy is to be considered in all respects valid, unless it is avoided by the insurer before loss: *Allison v. Phoenix Co.*, *supra*. But Judge COLT thinks otherwise: *Turner v. Meridian Co.*, *supra*.

In New York the rule that if the invalidity of the second policy does not appear on its face, it avoids the prior one, was adopted in *Bigler v. New York C. Co.* (1860), 22 N. Y. 402. If a second policy is void *ab initio*, the insured is not thereby relieved from the forfeiture resulting from the violation of the stipulations contained in the first. This is ruled on the ground that, to hold a contract which has been violated by only one of the parties to it, void as to both, is to put it in the power of either, after making

it, to render it a nullity by simply violating some one of its conditions: *Stevens v. Phoenix Co.* (1884), 83 Ky. 7; *Baer v. Phoenix Co.* (1868), 4 Bush (Ky.), 242; *Allen v. Merchants' Mut. Co.* (1878), 30 La. An. 1386.

If the clause, prohibiting other insurance, uses the words "whether valid or not," all inquiry as to the validity of a subsequent policy is immaterial: *Continental Co. v. Hulman* (1879), 92 Ill. 145. The use of the words quoted is an agreement that the validity or invalidity of other insurance, taken without consent, should not be the subject of future contract. Such an agreement is not against public policy, nor is it prohibited by law. If the prohibited policy, held or received by the insured, is in and of itself invalid and void, so that in fact it constitutes no contract of insurance, it will not affect the validity of another policy. But if, to avoid it requires the production of facts extraneous to the policy, it will avoid another policy: *Phoenix Co. v. Lumar* (1886), 106 Ind. 513. Under such a condition, an invalid policy, obtained in good faith, avoids a prior one: *Sugg v. Hartford Co.* (1887), 98 N. C. 143; *Somerfield v. State Co.* (1881), 8 Lea (Tenn.), 547. *Contra*: *Stevens v. Citizens' Co.* (1886), 69 Iowa, 658.

When defendant issued its policy, the property was already insured by a policy which provided that it should be void if other insurance was taken, whether it was valid or not. The same provision was in the policy sued upon. The first policy was not at once invalidated on the issue of the second, and the latter was itself void: *Keyser v. Hartford Co.*, Sup. Ct. Mich., July, 1887.

Under the usual prohibitory clause, the words "valid or invalid" being absent, a policy, voidable at the election of the insurer, is a violation:

Landers v. Watertown Co. (1861), 86 N. Y. 414, reversing s. c. (1879), 19 Hun (N. Y.), 174; *Emery v. Mutual Co.* (1883), 51 Mich. 469; *Robinson v. Fire Ass'n* (1886), 63 Id. 90; *Turner v. Meridian Co.*, *supra*; *American Co. v. Reploggel*, Sup. Ct. Ind., March, 1888; *Equitable Co. v. McCrea* (1881), 8 Lea (Tenn.), 541; *Funke v. Minnesota Farmers' Mut. Co.* (1882), 29 Minn. 347; *Lackey v. Georgia, etc. Co.* (1871), 42 Ga. 456.

A forfeiture is not avoided because the insured obtained other policies without knowledge of the condition forbidding it, and in good faith: *Gee v. Chesire Mut. Co.*, *supra*; *Zinck v. Phoenix Co.* (1882), 60 Iowa, 266; *Allen v. Merchants' Mut. Co.*, *supra*; *Bonnerille v. Western Co.* (1887), 68 Wis. 298; *Keyser v. Hartford Co.*, *supra*.

If the insured warranted his answers concerning the amount of his insurance, and unintentionally misstated its amount, his good faith is immaterial, though the insurer knew the fact to be otherwise than as it was stated: *Commonwealth Mut. Co. v. Huntzinger* (1881), 98 Pa. 41.

A third view of the question under consideration is taken in Iowa, where it is held that the right to recover under the prior policy, depends upon the act of the second insurer. If its policy has been treated by it as valid, any breach of the conditions therein being waived, the right of action upon the prior policy is gone: *Hubbard v. Hartford Co.* (1871), 33 Iowa, 325; *David v. Hartford Co.* (1862), 13 Id. 69; *Behrens v. Germania Co.* (1884), 64 Id. 19.

As has been suggested, the New England rule is largely rested upon the construction given the word insurance. The opposing rule is supported on the theory that it is in harmony with the intention of the

parties and in furtherance of public policy. The argument in support of the latter and against the former view is thus stated by the Minnesota Court: "The plaintiff intended to secure indemnity by the second insurance, and thereby removed from his mind all motives of self-interest in the preservation of the property, so far as other insurance could have that effect. Whatever increased hazard other insurance could cause, was effected to the full extent if insured supposed the second policy valid and enforceable; and, in a less degree perhaps, if he knew it to be void at the election of the insurer, and that he could not recover on it if the facts avoiding it should be discovered. The Court criticises the narrow construction given the word insurance, and observes that it is not at all necessary, from a consideration of the proper and natural import of the word, and we are unable to comprehend how it can be regarded as expressing the agreement in the minds of the parties, without disregarding what every one must understand to have been the purpose contemplated. The same construction would make a second insurance inoperative to terminate the liability of a prior insurer, under the usual conditions of a policy, if it should appear after the loss had occurred that the second insurer had been, from the time of making the contract, insolvent. The word insurance, in common speech and with propriety, is used quite as often in the sense of contract of insurance, or act of insuring, as in that of expressing the abstract idea of indemnity or security against loss. In that sense the word was used in this contract. The rule in Iowa is also disapproved, on the ground that it "makes the validity of the contract between two parties depend not upon their own agreement,

nor upon their own acts, but upon what another person, a stranger to the contract, may do, even after the liability upon the contract had become absolute by the destruction of the property, if, in fact, there was any obligation. The making of the second contract of insurance violated the terms of the former contract, if at all, at the time such second contract was made. The subsequent affirmation, or disaffirmance, of that contract by the insurer, as he might elect, would not affect the validity of the former contract between other parties:" *Fluke v. Minnesota Farmers' Mut Co.*, *supra*.

In line with the view of the Minnesota Court, as to the question of public policy, is a Georgia case ruled under a statute which provides that "a second insurance, unless by consent of the insurer, voids his policy." It is said of this provision that it is founded in public policy; it is intended to protect insurers and the public against the evils of double insurance. It is just as entirely within this public policy to have a second insurance which one thinks is good, as to have one which is really good. Though there is a second policy, technically there may be no second insurance; but to give this construction to the statute would be, indeed, sticking in the bark. The manifest intent of the law is to prevent the existence of persons in the community who have an inducement to set their houses on fire. To say that this law does not apply to the case of a man who, in fact, has this inducement, but who, if his fraud is discovered, cannot get the benefit of it, is making the law of very little effect. The second policy in this case was not binding upon the company in consequence of misrepresentations made by the insured: *Lackey v. Georgia, etc. Co.*, *supra*.

Simultaneous policies.—Two policies in different companies were to take effect at the same hour of the same day, one of which policies provided that if insurance should be or should hereafter be made, covenant should be given, etc. In a suit on the policy which so stipulated, the Court observed that whether the other was prior or subsequent, was immaterial. If prior, the defendant ought to have had notice of it, and if subsequent, it ought to have had it. Though the risk commenced, as to each, at the same moment, yet, without proof it cannot be presumed that the agents of two different companies issued to the same assured simultaneous policies. The presumption in law, as well as in fact, is, in the absence of proof, that one policy was antecedent to the other, and that notice ought to have been given. And looking at the reason and object of the provision, it seems that if proof had been made of the simultaneousness of the policies, notice should have been given: *Manhattan Ins. Co. v. Stein, supra*. Defendant company insured plaintiff, and without his authority placed part of the risk in another company. Both policies were of the same tenor and date. That obtained by defendant was neither prior nor subsequent to its own, and the absence of the required indorsement from it did not affect the other policy: *Washington Co. v. Darison* (1868), 30 Md. 91.

Renewed and substituted policies.—A renewal is in one sense a new contract, but it is not other insurance within the meaning of policies. It is but a continuation of an existing insurance. If notice of the original insurance has been properly given, it is good through all true renewals of it: *Pitney v. Glen's Falls Co., supra*; approving *Brown v. Cattaraugus Mut. Co.* (1858), 18 N. Y. 385. But re-

newing insurance which it was represented would expire at a given time, and would not be renewed, avoids a policy: *Dietz v. Mound City Mut. Co.* (1866), 38 Mo. 85.

In substituting a policy for an expired one, which was carried by consent, the amount being the same, is not contrary to the usual condition: *First Baptist Society v. Hillsborough Mut. Co.* (1849), 19 N. H. 580; *Russell v. State Co.* (1874), 55 Mo. 585, 595; *New Orleans Ass'n v. Holbery* (1886), 64 Miss. 51. Other insurance was allowed. Notice was required to be given of all additional insurances, and of all changes which might be made therein. A new policy was obtained from the same company as that whose policy was consented to, and for the same sum. The total amount of the insurance was distributed materially different by the second policy than by the former one. The omission to give notice was fatal to the claim under the original policy: *Simpson v. Pennsylvania Co.* (1861), 38 Pa. 250. Unless notice is required in such a case by the terms of the policy, it need not be given: *American Co. v. McCrea* (1881), 8 Lea (Tenn.), 513. But see *infra*.

The application covenanted that the property upon which insurance was desired was then insured for \$8000 in two companies named. This was not true. Soon after the desired policy issued, policies were obtained in two other companies for that amount. Notice of these was not given as required, and it was claimed that because the whole amount of insurance did not exceed the sum which was allowed, the obligation to give notice did not apply. The Court ruled that the insurance obtained was other insurance than that to which consent was given, and the failure to give notice was fatal: *Conway T. Co.*

v. *Hudson R. Co.* (1853), 12 Cush. (Mass.) 144.

If notice of subsequent insurance is required to be given, the fact that a policy obtained is a substitute for a previous one issued by another company, notice of which was given, and for a less amount, does not relieve the insured from complying with the condition: *Burt v. People's Mut. Co.* (1854), 2 Gray (Mass.), 397.

Extent of forfeiture.—If the premium is entire, and the conditions of a policy insuring the whole property have been violated by obtaining one which covered only part of such property, the whole claim under the prior policy is forfeited: *Kimball v. Howard Co.*, *supra*; *Allen v. Merchants' Mut. Co.*, *supra*. This is the rule if the property is so situated as to constitute substantially one risk, though the policy apportions the insurance to each class of property, in this case, a building and the furniture in it: *Havens v. Home Co.* (1887), 111 Ind. 90. The cases which hold with and against this view are collected in the opinion in this case, and also in *Berryman's Insurance Digest*, pp. 830–833, and notes. They arose out of breaches of other conditions than are herein considered, and for that reason are not stated here.

Notice of other insurance.—There is an obvious distinction between notice of a past and subsisting insurance, and notice of a desire or intention to obtain a future insurance. A subsisting insurance is a fact, and capable of proof. If written notice of it be given, the company makes its new policy with absolute knowledge that double insurance will subsist the moment it is made; and it subsists by its act and consent. But mere notice that the insured wishes to make further assurance, to which assent is not given, then or after it is made, does

not have the same effect: *Forbes v. Agawam Mut. Co.* (1852), 9 Cush. (Mass.) 470. If it is required that notice shall be given to the company, and indorsed on the policy, or acknowledged in writing, notice of an intention to procure other insurance, given to the agent of the company which has insured the property, is not sufficient: *Kimball v. Howard Co.* *supra*; *Healey v. Imperial Co.* (1869), 5 Nev. 268; *New Orleans Ass'n v. Griffin* (1886), 66 Tex. 232; *Schenck v. Mercer Mut. Co.*, *supra*. Notice that there is another insurance, and that it is the intention to renew it, is not notice of the fact of renewal: *Healey v. Imperial Co.*, *supra*.

A requirement that notice shall be given with "reasonable diligence," is not satisfied by serving it seven months after a second policy was obtained, and after a loss had occurred: *Kimball v. Howard Co.*, *supra*. The words "reasonable diligence" make unnecessary delay fatal to a recovery. An unexplained failure to serve notice for nineteen days is conclusive proof of a want of such diligence: *Mellen v. Hamilton Co.* (1858), 17 N. Y. 609–620. If the insured has a specified number of days in which to give notice, the insurer is not relieved, unless it shows that the forbidden policy was in force for that length of time before the loss: *Cumberland Mut. Co. v. Giltinan* (1896), 48 N. J. L. 495.

The first insurer is not chargeable with the knowledge of a broker who effected a subsequent insurance in that capacity, and whose services were compensated by such insurer by commissions on the premiums he paid on such risks as were accepted: *Mellen v. Hamilton Co.*, *supra*; *Royal Co. v. McCrea* (1881), 8 Lea (Tenn.), 531. If the policy provides that the broker who effected the insurance shall be the insured's agent, notice

to him does not affect the company: *Fire Ass'n v. Hogwood* (1886), 82 Va. 342.

A condition which requires notice to the company is not met by giving it to one who had been its agent, but who had ceased to act as such, and had given public notice to that effect: *Illinois Mut. Co. v. Malloy* (1869), 50 Ill. 419. If it is not provided how or to whom notice shall be given, and it is given to an agent who has apparent authority, under circumstances indicating that he had general power, then, although the fact was that his authority was limited, the insured being without knowledge of the extent of his power, notice to him binds his principal: *Phoenix Co. v. Spiers*, Ct. App. Ky., May, 1888. Knowledge of the agent who issued the policy, and his agreement that further insurance may be taken, binds his principal, if notice is not required to be given the company in writing: *Kenton Co. v. Shea* (1869), 6 Bush (Ky.), 174; *Von Borries v. United Co.* (1871), 8 Id. 133. Notice to an agent, while he is such, concerning business within the scope of his authority, is notice to his principal. The policy issued by defendant's agent, who was also agent for another company, had expired, and he had notified the insured that it could not be renewed on the same terms. The insured made known to the agent his purpose to keep up all the insurance he usually carried, and procured a policy for the same amount in another company, and told the agent what he had done. The latter said it was all right: *Hayward v. National Co.* (1873), 52 Mo. 181, overruling *Hutchinson v. Western Co.* (1855), 21 Id. 97, which held that the condition as to the indorsement of consent was a condition precedent to the right to recover, and that nothing would prevent a forfeiture but an

actual indorsement. In accord with the later Missouri case are *N. E. F. & M. Co. v. Schettler*, *supra*; *Miller v. Hartford Co.* (1886), 70 Iowa, 704; *Schenck v. Mercer County Mut. Co.*, *supra*. The agent's neglect to make the proper indorsement cannot affect the insured's rights: *Ibid*.

It was required that all applications should be in writing. The blanks prepared did not contain a form for a statement as to other insurance, which was required to be given to the company. Parol notice given an agent who was empowered to solicit contracts, make surveys, and receive applications while he was preparing the application for the policy in suit, was held sufficient, though the company never received it: *McEwen v. Montgomery Mut. Co.* (1843), 5 Hill (N. Y.), 101. A condition requiring the insured to give notice of other insurance made on his behalf, does not require notice of insurance made otherwise than by his authority or subsequent sanction: *Franklin Co. v. Drake* (1841), 2 B. Mon. (Ky.) 47.

In the absence of a requirement as to the form of notice and the manner of its service, any definite and certain information communicated to an agent authorized to act for the company, by the insured or his agent, is all that is necessary: *Union Co. v. Murphy* (1886), Sup. Ct. Pa., 17 W. N. C. 243.

If a prior policy has been issued by the same agent who granted a second one, to a party who had an insurable interest in the property, and the person insured by the second policy did not know of the existence of the first, his failure to give notice is immaterial: *Rowley v. Empire Co.* (1867), 36 N. Y. 550.

If an insurer has failed to issue a policy according to its contract, it cannot visit upon the insured prejudicial results growing out of its neglect. In

such a case notice to the local agent of other insurance is all that is required, and his consent or acquiescence is equivalent to an indorsement: *Baile v. St. Joseph Co.* (1881), 73 Mo. 371. Actual knowledge of the other insurance is all that the first insurer can insist upon: *Eureka Co. v. Robinson* (1867), 56 Pa. 256.

If the policy of a mutual company requires that written notice shall be given the company, and acknowledged by the secretary in writing, the mere knowledge of an agent, who is not authorized to issue policies, is not such notice as binds his principal: *Commonwealth Mutual Co. v. Hunter*, *supra*. A condition requiring that notice shall be given to the company, and that it shall be indorsed, or otherwise acknowledged in writing, is not complied with by exhibiting a memorandum of subsequent insurance to an agent of the first insurer who was authorized to receive notice thereof and to enter it on his policy-book, though such agent took the memorandum to make an entry and returned it to the insured, and said that he had entered it, and that it would be indorsed on the policy, no such entry being in fact made: *Worcester Bank v. Hartford Co.* (1853), 11 Cush. (Mass.) 265. *Contra*: *Illinois Mut. Co. v. Malloy*, *supra*. See the cases stated *supra*, and the paragraphs "Estoppel" and "Waiver, *infra*."

A mistake in a notice regularly given, whereby it appeared that the whole of the additional insurance was placed in one company, the fact being that it was equally divided between two companies, is immaterial: *Benjamin v. Saratoga Mut. Co.* (1858), 17 N. Y. 415. If the fact of other insurance is regularly made known, the terms and conditions upon which it was made are immaterial, no questions being asked relating thereto: *McMa-*

hon v. Portsmouth Mut. Co. (1850), 22 N. H. 15.

The proposals for insurance and the policy required that notice of all previous insurance should be given the company and indorsed on the policy or otherwise acknowledged by it in writing. Held, that, at law, whatever might be the case in equity, mere parol notice was not sufficient; that it was necessary that a prior policy should be mentioned in or indorsed upon the later one: *Carpenter v. Providence Co.*, *supra*.

Consent to other insurance.—Under the by-laws of a mutual company, any policy which it issued on property previously insured, was to be void, unless the previous insurance was expressed therein. The policy in suit contained this condition, but did not contain any statement as to existing insurance. The company had knowledge that there was insurance on the property, and that it was the insured's intention that it should continue. He accepted the policy without knowing that it did not mention such insurance. It was ruled, in a suit by his assignee, that the failure to comply with the condition avoided the policy, and parol evidence could not be received to remedy the defect: *Barrett v. Union Mut. Co.* (1851), 7 Cush. (Mass.) 175. Defendant's by-laws required that subsequent insurance should have "the consent of the directors, signified by a statement thereof in the policy, or by indorsement thereon, signed by the secretary." One of its directors indorsed a memorandum made by the applicant on his application, which was thereon when it reached the company, and was as follows: "Applicant asks leave to insure \$1000 on same property in some other company. Please signify the assent of the company in the policy." This was not in compliance

with the by-laws: *Forbes v. Agawam Mut. Co.*, *supra*. The required assent was not inferable from the knowledge of the agent who issued both policies: *Ibid*. The charter of the defendant company gave it the power to make by-laws, and they provided that any insurance subsequently obtained, without the president's written consent, should avoid any policy it had issued. The by-law containing this provision was attached to the policy in suit. The verbal consent of the president to other insurance, was not binding on the company: *Hale v. Mechanics' Mut. Co.* (1856), 6 Gray (Mass.), 169.

A mutual company, whose by-laws provide that certain of its officers may consent to other insurance, is not bound by consent given by its agent: *Behler v. German Mut. Co.* (1879), 68 Ind. 347. None but the officers authorized can give binding consent: *Stark Mut. Co. v. Hurd* (1850), 19 Ohio, 149, 177.

If the secretary of the first insurer has knowledge of a subsequent policy, and advised that it be procured, and two of its directors verbally assented thereto, such number being authorized to issue policies, and the condition did not require that the notice or consent should be in writing, but did require the consent of the directors, five in number, a majority of whom could transact business, such consent is good: *Goddall v. New England Co.* (182), 25 N. H. 169, 194.

The policy provided that it would not be valid, unless countersigned by a general agent at a designated place, and prohibited other insurance, prior and subsequent, without written consent thereon. It was said that every sound rule of construction required that consent should be signed by the designated agent. An unsigned consent could not be sustained in the

absence of such agent's signature, without distinct proof that it was made by some one who was, in fact, or by his conduct might fairly be supposed to be, authorized to bind the company in that way, unless his act was so recognized and acted upon as to bind it by estoppel: *Security Co. v. Fay* (1871), 22 Mich. 467.

An agent who is authorized to make and revoke contracts, is the proper person to consent, if his powers are not restricted, or the insured has no notice of the limitations on them: *Planters' Mut. Co. v. Lyons* (1873), 38 Tex. 253. If the agent who effects the insurance, and is intrusted with the policy to deliver it to the insured, is notified, before the policy reaches him, of other insurance, and makes the proper indorsement, the company is bound by his act: *Dayton Co. v. Kelly* (1873), 24 Ohio St. 345. Under a condition that assent should be indorsed on the policy, or else assented to in writing, if an agent authorized to issue a policy delivers it with knowledge of prior insurance, the policy so delivered is the written assent of the company to such insurance: *Kenton, etc. Co. v. Shea*, *supra*. Verbal consent given by an agent, with knowledge that it will be acted on, waives the requirement that the consent shall be written upon the policy: *Carrugi v. Atlantic Co.* (1869), 40 Ga. 135. If it was given under such circumstances as obliged him to consent or refuse, and was unequivocal and with knowledge of all the facts, there is a waiver: *New Orleans Ass'n v. Griffin*, *supra*. All the policies were issued by the same agent. He testified that the insurers were notified of the fact that there was other insurance, and his books, as defendant's agent, showed the fact that other policies were issued. It was ruled that the object and purpose of indorsing consent

on the policy was fully attained: *Insurance Co. of N. A. v. McDowell* (1869), 50 Ill. 120.

Defendant's policy was not to be valid unless it was countersigned by the agent who issued it. Immediate notice of other insurance was required to be given to its secretary. Eight months after it was issued, and before loss, such agent indorsed his consent to such insurance, and notified the company. No objection was made. *Held*, that if the company desired to repudiate the policy, it ought to have done so on receipt of the notice. It could not, with knowledge of the facts, retain the premium and withhold objections until after loss: *Farmers' Mut. Co. v. Taylor* (1873), 73 Pa. 342.

A general agent's verbal consent binds his principal, although the policy provides that none of its conditions shall be waived, except by writing. Consent to other insurance is given by promising to indorse it on the policy: *Morrison v. Insurance Co.* (1887), 69 Tex. 353.

The knowledge of one who is employed by the general agent of an insurer to solicit risks and collect premiums, and who has power to bind the company from the date of the application until such agent acts thereon, and who is paid a commission by such agent, binds the company: *Hamilton v. Home Co.* (1887), 94 Mo. 353.

A letter written by defendant's secretary to plaintiff stated: "I have received your notice of additional insurance." This was a sufficient acknowledgment and approval to satisfy a condition requiring the consent to be indorsed or otherwise acknowledged and approved in writing. After the receipt of notice the policy continued in force until the insurer made its election to continue or terminate the

risk: *Potter v. Ontario Mut. Co.* (1843), 5 Hill (N. Y.), 147.

If the president of a company has knowledge of other insurance on the property before, it issues a policy thereon, and omits to make the required indorsement, the absence of such indorsement, in a suit to reform the contract, cannot be urged: *National, etc. Co. v. Crane* (1860), 16 Md. 260-296.

An offer by an agent to take other insurance is not a consent to any specific additional insurance, and does not meet a requirement that consent shall be written on the policy: *Allemania Co. v. Hurd* (1877), 37 Mich. 11.

A by-law requiring consent to be written in the policy is satisfied by writing it on the margin of the policy: *Liscom v. Massachusetts Mut. Co.* (1845), 9 Met. (Mass.) 205. A statute requiring that consent that shall be signified by indorsement on the the back of the policy, signed by the president and secretary, is complied with by a recital in the policy of the prior insurance and its amount, the policy being signed by the officers designated: *First Baptist Society v. Hillsborough Mut. Co.*, *supra*. If consent to additional insurance is in writing, it is good though it is not written on the policy, as that instrument required it should be: *Mattocks v. Des Moines Co.* (1887), 74 Iowa, 233. The consent need not specify the companies in which the additional insurance may be placed, if there is no restriction in the policy: *Westchester Co. v. Earle* (1876), 33 Mich. 143.

If insurance is taken in excess of the sum specified in the consent, and is in force when the loss occurs, the consenting insurer is relieved from liability: *Shurtleff v. Phoenix Co.* (1869), 57 Me. 137; *Bonneville v.*

Western Co. (1887), 68 Wis. 298; *Behrens v. Germania Co.* (1882), 58 Iowa, 26. But the insured is not bound to take the full amount permitted: *Liscom v. Boston Mut. Co.* (1845), 9 Met. (Mass.) 205. Consent to take additional insurance to a specified amount, means prior as well as subsequent insurance: *Behrens v. Germania Co.*, *supra*.

If a contract for present insurance is made, and a policy is to be issued subsequently on the same risk, the contract being subject to the conditions of the printed policy, a condition therein, requiring that other insurance shall be indorsed on the policy, does not make it necessary that an indorsement be made in or on the contract: *Dayton Co. v. Kelly* (1873), 24 Ohio St. 345.

Oral consent given by an agent, to an agent of one insured, to take additional insurance for his principal, does not follow an assignment of the policy, and authorize him who was the insured's agent, to take other such insurance after he has become the owner of his principal's property: *Hower v. State Co.* (1882), 58 Iowa, 51.

Estoppel.—If the insurer, on being notified of other insurance by its agent, does not make the proper indorsement or notify the insured that it refuses to carry the risk, it is estopped from claiming a forfeiture: *Planters' Mut. Co. v. Lyons* (1873), 38 Tex. 253. Defendant issued a policy for \$6000, and at its request, was relieved of one-half of the risk, which the insured placed in a company named by the first insurer. Defendant's policy was given to its agent for the purpose of having the proper indorsement made. This he neglected to do. *Held*, on demurrer, that defendant was bound to give consent, and to do all other acts which might

be necessary to prevent the insured from being injured by the additional insurance: *Cobb v. Insurance Co. of N. A.* (1873), 11 Kan. 93.

The complaint alleged the execution of the policy sued upon, the loss of the property covered by it, and that it was expressly agreed and understood that said plaintiff was to have permission to take out an additional insurance of \$1000 on said building in any other company and at any time she desired, and said company agreed to insert said condition in said policy, which it wholly failed to do. The plaintiff averred, that relying upon said promise, and in pursuance of said contract and agreement, she had effected an insurance on said building, as permitted by the express agreement aforesaid. No notice of the second insurance was given. In addition to the usual clause, prohibiting other insurance, the policy in suit expressed that nothing less than a distinct, specific agreement, clearly expressed and indorsed on it, should be construed as a waiver of any condition or restriction in it. The complaint did not show an estoppel, because it did not appear that plaintiff was induced to accept the policy, without knowledge that the stipulation was not on it; nor that she ever requested that it should be indorsed: *Havens v. Home Co.* (1887), 111 Ind. 90.

An insurer is not estopped from claiming a forfeiture, if its conduct has not misled the insured to his prejudice. Mere knowledge, on its part, that he has violated the conditions of the contract, is immaterial: *New York Co. v. Watson* (1871), 23 Mich. 486.

A policy in a mutual company expressly referred to the act which incorporated it and the by-laws of the company. Two sections of the charter

were printed on the back of the policy, but in such a way as not to indicate that the entire instrument was set out there. Among the omitted provisions were those which forbade other insurance without the consent of the directors, indorsed on the policy. It was claimed that the company was estopped from setting up the provisions referred to, because they were not made a part of the policy. This position was held untenable, and the whole of the charter and by-laws were considered part of the contract: *Fabgan v. Union Mut. Co.* (1856), 33 N. H. 203.

If the indorsement which gave consent to other insurance authorized the insured to carry a less amount than the notice specified, and was consented to, and the insured did not notice the variance until after loss, evidence to show that consent was given to the full amount taken is admissible: *Greene v. Equitable Co.* (1877), 11 R. I. 434.

If notice of other insurance is given to an agent, who has full discretion in the premises, and who did not object to it, and said nothing about cancelling the first policy, and who subsequently effected additional insurance on the same risk in other companies he represented, the first insurer is estopped: *Crescent Co. v. Griffin* (1883), 59 Tex. 509; *Hadley v. N. H. Co.* (1875), 55 N. H. 110; *Flabbeck v. Phoenix Co.* (1880), 54 Cal. 422; *Hayward v. National Co.* (1873), 52 Mo. 181; *Harwitz v. Equitable Co.* (1867), 40 Id. 557; *Russell v. State Co.* (1874), 55 Id. 585. If a soliciting agent, with knowledge of existing insurance, prepares an application for a policy and represents therein that there is no insurance, and the applicant signs it in good faith, the company cannot set up the prior insurance: *American Co. v. Lettrel*

(1878), 89 Ill. 314. And this is so if an agent, acting for two companies, falsely informs the insured that the proper indorsement had been made: *Mentz v. Lancaster Co.* (1875), 79 Pa. 475; *Redstrake v. Cumberland Mut. Co.* (1882), 44 N. J. L. 294; *Combs v. Shrewsbury Mut. Co.* (1881), 34 N. J. Eq. 403. Or, that an indorsement was not necessary: *Kitchen v. Hartford Co.* (1885), 57 Mich. 135. Or, if the agent of the first insurer has led the insured to believe that he has no objections to his obtaining another policy: *American Co. v. Gallatin* (1879), 48 Wis. 36.

Notwithstanding the first policy requires the written consent of the company to other insurance, and provides that the use of general terms or anything less than a distinct specific agreement, clearly expressed, and indorsed on it, shall not be construed as a waiver of any condition or restriction therein, yet, if an agent authorized to issue policies, and who has issued the one in suit, and whose power does not appear to have been restricted in any way, has so acted with the insured as to bind himself, by estoppel, not to dispute the validity of the subsequent policy, his principal is also estopped: *Westchester Co. v. Earle* (1876), 33 Mich. 143. But, if the policy gives the insured notice that the insurer's agent cannot waive, modify, or strike from it, any of its provisions, nor revive it, if a forfeiture shall have accrued, the insurer is not estopped by the agent's assurance to the insured that other insurance will be all right: *Cleaver v. Traders' Co.*, Sup. Ct. Mich., April, 1887.

After a loss, and with knowledge of the violation of defendant's policy, its general agent required the insured to furnish plans and specifications of the building destroyed. In doing so,

expense was incurred. This was held decisive as to the defendant, and it could not thereafter claim that a forfeiture had accrued. It was immaterial that another insurer of the same property made a similar requirement; and it seems that it would have been immaterial if both insurers had joined in such demand: *Webster v. Phoenix Co.* (1874), 36 Wis. 67. An insurer, whose agent, with full knowledge of the existence of other policies on the property, participates in adjusting a loss and acquiesces in the apportionment made to each of the insurers, and promises to pay the proportion due from his company, is estopped, if the insured has settled with the other insurers on the basis of the adjustment: *Flatbeck v. Phoenix Co.* (1880), 54 Cal. 422.

Waiver.—Permission given by indorsement on a policy, to obtain additional insurance to a specified amount, waives a printed requirement that notice of other insurance shall be given, if insurance is not taken in excess of the limit: *Benedict v. Ocean Co.* (1865), 31 N. Y. 389; *American Co. v. McCrea* (1881), 8 Lea (Tenn.), 513. If the question in the application, concerning other insurance, is not answered, and a policy is issued thereon, the condition in the latter relating thereto is waived: *Dayton Co. v. Kelly* (1873), 24 Ohio St. 345. If the insurer, after receiving notice of other insurance from its general agent, omits to cancel its policy, by returning a proper proportion of the premium, it waives the right to claim a forfeiture: *Von Borries v. United Co.* (1871), 8 Bush (Ky.), 133. If the secretary of the company which issued a policy, declares in writing, knowing all the facts, that the policy is good, and subsequently levies an assessment upon it, such act is a waiver of the lack of indorsement and

confirms the policy: *Atlantic Co. v. Goodall* (1857), 35 N. H. 328. So held as to the assessment: *McKenzie v. Planters' Co.* (1872), 9 Heisk. (Tenn.) 261. Making an adjustment, with knowledge of the breach of a condition, is a waiver: *Levy v. Peabody Co.* (1877), 10 W. Va. 560.

Consent was required to be indorsed upon the policy. Plaintiff signed a blank application, which was filled out by defendant's general agent; at the latter's request, the former delivered to him policies upon the same property in another company, which had been issued by him as its agent. No mention was made in the application for the policy in suit, which was filled up by the agent and forwarded to defendant as an accepted application, of the existence of the former policies. The Court observed that when the former policies were handed the agent at his own request, he must have known what the object was, and had full opportunities to acquire information by reading them. He was clearly put upon inquiry to know their relation to the subject on hand. The plain presumption is that he read the policies and acquired full information of their existence and contents. The notice thus supplied to him was, on general principles of the law of agency, notice to the defendant. It must be assumed, accordingly, that owing to his general agency, the defendant knew that there was other insurance on the property, and with that knowledge, made no statement of the fact on the policy. This act may be called a waiver, or may be treated as an estoppel: *Pitney v. Glen's Falls Co.* (1875), 65 N. Y. 6-28.

Other concurrent insurance to the amount of \$3000 was allowed by defendant's policy, which provided that it should be part of the contract, "that any person other than the

assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." The agent who delivered the policy, knew that the property which it covered, was insured to the amount of \$6000. Such delivery was held to be an implied waiver of the condition prohibiting more than \$3000 other insurance: *Putnam v. Commonwealth Co.* (1880), 18 Blatch. (U. S. C. Ct. N. D. N. Y.) 368; a. c. (1880), 4 Fed. Repr. 753.

If a general agent of a foreign company, who is authorized in writing, to countersign and issue policies, "and otherwise to do and perform the customary acts and duties of" an insurance agent, and whose duty, it is shown by the testimony in the case, is to make indorsements of other insurance, has knowledge of such insurance, and does not disclaim the authority to make such indorsement, but postpones doing it, on account of his own convenience, when the policies are produced for that purpose, the condition requiring such indorsement will be considered waived. The knowledge and consent of such an agent as to the amount of insurance, are not made ineffectual because he does not know in precisely what companies it is placed; and a change to another company, otherwise unexceptionable, does not alter the rule: *American C. Co. v. McCrea* (1881), 8 Lea (Tenn.), 513.

If an agent, having authority, insures property, with knowledge that policies are outstanding upon it, the condition providing for a forfeiture, is thereby waived: *Lycoming Co. v. Barringer* (1874), 73 Ill. 230; *Richmond v. Niagara Co.* (1879), 79 N. Y. 230;

Hornthal v. Western Co. (1883), 88 N. C. 71; *Schomer v. Hekla Co.* (1880), 50 Wis. 575; *Brandup v. St. Paul Co.* (1880), 27 Minn. 393; *Geib v. International Co.* (1870), 1 Dill. (U. S. C. Ct. D. Minn.) 443. Although the policy issued by such agent, provides that anything less than a distinct, specific agreement, clearly expressed and indorsed thereon, shall not be construed as a waiver of any restriction in it: *Roberts v. Continental Co.* (1877), 41 Wis. 321. Under such a condition as is last stated, and a requirement that a waiver shall be signed by the secretary, if a general agent receives a renewal with knowledge of other insurance, the right to claim a forfeiture is waived: *Carroll v. Charter Oak Co.* (1868), 1 Abb. Ct. App. (N. Y.) 316; affirming a. c. (1863), 40 Barb. (N. Y.) 292.

If part payment of a loss is made, under a policy which was issued by an agent, with knowledge of the existence of other policies, the insured may recover the full amount: *Sherman v. Madison Mut. Co.* (1875), 39 Wis. 104. Taking part, by an agent, in adjusting a loss, and calling upon the insured for information, in furnishing which he incurred expense, is a waiver: *Carpenter v. Continental Co.* (1886), 61 Mich. 635. After knowledge of other insurance and after loss, defendant's adjuster wrote plaintiff, in reply to a request for information as to the attitude of the company concerning the loss, that if insured has a fair and legal claim under the policy, he should make out "such proofs as the policy requires and send same here; and on receipt of same, the claim shall be investigated at once, and you shall be promptly advised of our views." Plaintiff made proof of his loss and incurred expense in doing so. This was held to be a waiver: *Cannon v. Home Co.* (1881), 53 Wis.

585. After the loss, the defendant's adjusting agent, with knowledge of the second policy, made an offer of compromise, and raised objections to such policy. The offer was declined, and the agent soon after wrote plaintiff that she might make proof of loss, and the matter would then be taken into consideration. At the agent's request, defects in the proofs were remedied from time to time, and plaintiff was notified that "in addition to the objections heretofore made," defendant would insist upon the forfeiture, because of the second insurance. *Held*, that these facts warranted a finding that defendant waived the forfeiture: *Pennsylvania Co. v. Kittle* (1878), 39 Mich. 51.

A general agent of a stock company, whose place of business is remote from the company's office, and who is authorized to issue policies and indorse consent to other insurance, may bind his principal by a parol waiver of the condition, requiring insurance to be indorsed. Such waiver is provable by parol evidence: *Peckner v. Phoenix Co.* (1875), 65 N. Y. 195.

The agent who issued defendant's policy, also issued one for another company on the same property, and subsequently consented to a substitution of the latter policy, but omitted to make the proper indorsement on the one in suit. The condition was thereby waived: *Collins v. Farmville Co.* (1878), 79 N. C. 279.

Under a statute, which provides that any person who shall solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the company which issues the policy, an agent of the company who is authorized to issue policies, and who sends his clerk to solicit a risk and take an application, is bound by the latter's knowledge of other insurance, and the company which issues a policy pursu-

ant to the application, cannot be relieved from liability, because the required indorsement was not made: *Bennet v. Council Bluffs Co.* (1887), 70 Iowa, 600.

The insurer is not bound, after knowledge that its policy has become forfeited, and of a loss, to return the premium for the time the policy had to run, from the loss till it would have expired: *Phoenix Co. v. Stevenson* (1879), 78 Ky. 150.

Parol evidence cannot be received, to show that a policy prohibiting other insurance, was delivered with knowledge on the part of the company which issued it that there was then other insurance on the property. To admit such evidence would be contradicting a written instrument: *Batchelder v. Queen Co.* (1883), 135 Mass. 449; *Barrett v. Union, etc. Co.* (1851), 7 Cush. (Mass.) 175.

If the policy gives the insured notice that the agent of the insurer is not authorized to issue policies, nor to alter the terms of those issued, his consent cannot amount to a waiver of the requirement, that the consent of the company to other insurance shall be written on the policy: *Liverpool, etc. Co. v. Sorsby* (1882), 60 Miss. 302.

The receipt of information concerning other insurance, does not warrant the inference that there has been a waiver of the condition concerning changes in the distribution of the sum insured, upon the various classes of property covered by the policy: *Simpson v. Pennsylvania Co.* (1861), 38 Pa. 250. To constitute a waiver or estoppel, the act or conduct of the insurer must be such that the insured might reasonably infer therefrom, that it does not mean to insist upon the forfeiture, and the insured must have been misled to his prejudice. A direction to the insured, after the receipt of an informal claim against the

insurer, to the effect that if he has any claim against it under or by virtue of a policy, such claim must be made in strict accordance with the conditions prescribed, is not an admission of liability or a waiver, though the company then knew of additional insurance, contrary to its policy, and the insured subsequently made proofs of loss and incurred expense in doing so: *Phenix Co. v. Sterenson* (1879), 78 Ky. 150. The condition requiring written consent, is not waived, where the right to claim a forfeiture was not known until after loss, and the insurer's agent appointed an appraiser to determine the value of the property saved, and the company did not return the unearned premium: *Jewett v. Home Co.* (1870), 29 Iowa, 562.

When the policy in suit was obtained, defendant's agent offered to place an additional \$1000 on the property. The offer was declined. Subsequently the plaintiff took other insurance to the amount of \$1800, and notified the agent that he had taken insurance, but did not name the amount. After a loss the agent of the first insurer told plaintiff that his policy required him to make proof of his loss. This he did, and forwarded it to the company. The amount of the additional insurance was first made known when the proof was received. No waiver or estoppel was established by these facts, assuming that the agent's offer to take the additional insurance amounted to a consent to the amount he offered to take: *Bonneville v. Western Co.* (1887), 68 Wis. 298.

Knowledge on the part of an agent of an insurer, that a person insured desires other insurance at a less rate than his company would give, and that it was subsequently obtained, is not evidence of consent or waiver of

the written notice required: *Robinson v. Fire Ass'n* (1886), 63 Mich. 90.

An agent whose authority is limited to receiving applications, making surveys, remitting collections to the general agent and receiving the policies from him, cannot waive the conditions therein: *Haley v. Imperial Co.* (1869), 5 Nev. 268.

The charter of an insurance company is in the nature of an enabling act; it gives it all the power it possesses, and it is bound to exercise the power conferred upon it in the manner pointed out therein. Hence, if it is provided by the charter, that double insurance shall be void unless it exists by the consent of the company, indorsed upon the policy under the hand of the secretary, there can be no waiver of the requirement, and it cannot be proved that consent was given to other insurance, otherwise than by indorsement as specified: *Couch v. City Co.* (1871), 38 Conn. 181.

Compliance with a condition, requiring that subsequent insurance shall be indorsed, is not waived by notifying the insured, after he obtained such insurance, that an assessment was due from him, such notice being accompanied by a printed form, containing a schedule of losses, the insured's claim being included, and being marked "unadjusted." It did not appear that the company then knew of the forfeiture: *Forbes v. Agawam Mut. Co.* (1852), 9 Cush. (Mass.) 470.

Under the charter of a mutual company, one insured therein was deemed a member for the time specified in his policy, and was bound to pay his proportion of all losses and expenses happening to the company during his connection therewith. An assessment was paid after a loss of the property, but during the life of the policy. A

forfeiture previously incurred by the act of the insured, was not thereby waived: *Philbrook v. New England Mut. Co.* (1853), 37 Me. 137.

An agent of a mutual company, acting under a written appointment, made subject to a by-law, which made it his duty to take surveys and receive applications, and when required, to examine into the circumstances of a loss and make report, and, by the terms of a policy, to approve of assignments thereof, and collect assessments, is not authorized to accept notice of insurance beyond the amount allowed by the policy, or waive the consequences. This is especially the case in a mutual company, the insured being bound to know its rules: *Mitchell v. Lycoming Mut. Co.* (1865), 51 Pa. 402.

Explanatory.—In the foregoing statement of the cases which treat of the subject of other insurance, no attempt has been made at discussing, comparing or harmonizing the adjudications. Indeed, an effort to do the latter would be fruitless, and the lack of space forbids the experiment, as to either of the former. A casual survey and comparison of the cases and the dates of their decision will disclose that there is a marked and growing tendency on the part of the courts to liberalize, especially in the application of the principles of waiver and estoppel, against insurers. This has been made necessary by the conditions which have found their way into the modern policies. The same tendency is noticeable in the later cases, as to the powers of agents. But this is not so with regard to the validity of the second policy, or the New England rule of construction. For a long time, the weight of authority was in favor

of that rule; but the scale has been turned the other way, by the adjudications of the past five or six years. Since 1880, but one court which was not committed to that rule, has declared in its favor; while eight or nine, which had not taken position on it, have, during the years since, adopted the opposing rule. The question is an open one in several jurisdictions, and therefore of practical importance. The number of cases in the courts of last resort is so great that the decisions of intermediate courts could not be considered: nor could those of foreign tribunals, which are principally to be found in the reports of the British colonies.

J. R. BERRYMAN.

Madison, Wis.

In the recent case of *Commercial Union Assurance Co. v. Scammon*, Sup. Ct. Ill. Nov. 15, 1888, 28 AMERICAN LAW REGISTER, 190, an interesting question arose. After a property had been insured by the owner, another policy upon the same risk was, without the knowledge of the original assured, issued by the same company to a third person, who wrongfully claimed title. A loss having occurred, the amount of the latter policy was paid by the company to the second assured, who was subsequently, however, compelled by a decree in chancery to account for the moneys thus received to the real owner. It was held, that these facts constituted no defence to an action by the latter upon the first policy, and that he was entitled to recover, notwithstanding the second policy and the receipt by him of its proceeds under such decree.

JAMES C. SELLERS.

Supreme Court of California.

WEIDEKIND v. TUOLUMNE WATER CO.

It is error, for which a new trial will be granted, for the trial Court to permit an attorney, who has formerly acted for the plaintiff, to appear for the defendant, on a subsequent trial of the same case.

APPEAL from the Superior Court of Tuolumne County.

F. W. Street, for appellant.

E. A. Rogers, contra.

FOOTE, Commissioner, December 23, 1887. This is an action to recover damages, alleged to have been done to the plaintiff's mining claim, as is asserted, by the negligence of the defendant, which eventuated in the breaking of a dam, and the overflow of the water which it had confined. The jury trying the cause, returned a verdict for the defendant, upon which the Court rendered judgment, from which, and an order overruling a motion for a new trial, the plaintiff has appealed.

The plaintiff assigns for error, that the Court, against his objection, allowed an attorney and counsellor-at-law, who had formerly acted for the plaintiff in this very case, when it was previously tried, to appear and act on behalf of the defendant, on the trial of the cause last had. That attorney made this statement regarding the matter in the presence of the Court, while the trial was progressing: "As the Court well knows, Mr. Weidekind (the plaintiff), in the first trial of this case, did retain Mr. Dorsey and myself. I drew the complaint, and participated in the first trial of this case, in this Court. My compensation was to depend upon my success. As soon as I had earned that by our success, this plaintiff saw fit to discharge me and retain other counsel. With that act of his, I have never found fault. I have never been paid a cent by him for my services. An appeal was taken from the judgment in that trial entered. A new trial was granted by our Supreme Court. A new trial was had. Judgment was entered against plaintiff. An appeal was again taken, and another reversal followed. In each of these trials, plaintiff has had other counsel than myself. I am here to assist Mr. Rogers in the trial of this case, with all the knowledge I

have gained in the three trials.” Thereupon he did act as an attorney and counsellor on the trial, sitting by and assisting the attorney of record, arguing disputed points before the Court, and examining witnesses ; the Court having overruled the repeated objection of plaintiff’s counsel. This action of the Court is contended to be such an irregularity on its part, as prevented the plaintiff from having a fair trial. It was within the power of the Court, if satisfied that the attorney in question had acted on the plaintiff’s side of the case on the former trial, to prohibit his acting on the other side in another trial: *Weeks on Attys.*, § 120. There can be no doubt, from the statement of the attorney to the Court, that he proposed to act, and it is also certain that he did act, as an attorney and counsellor for the defendant in the trial of a cause where he had formerly acted for the plaintiff. The trial Court had a right, and it was its duty, to have forbidden the attorney from changing sides in the same suit, though at different trials ; for to do otherwise was “ to defeat the very purpose for which courts were organized, viz : the administration of justice :” *Wilson v. State* (1861), 16 Ind. 392. The evidence in this case and the statement of the attorney himself, was sufficient to show the Court that his intention was, for the benefit of the defendant, to use at that time, all the knowledge and secrets he had gained from his former client, in preparing for and conducting one trial, and observing and watching the developments of two others. This Court, speaking to such a question, says: We are of opinion that the Court, in that case, would have restrained him, even had he been unjustly discharged, and he was allowed, as contended, to be employed by the adverse party. The law secures the client the privilege of objecting at all times and forever to an attorney, solicitor, or counsellor, from disclosing information in a cause confidentially given while the relation exists. The client alone can release the attorney, solicitor, or counsel from this obligation. The latter cannot discharge himself from this duty imposed on him by law: *Re Coudery* (1886), 69 Cal. 32. The attorney himself boldly avowed his intention to so act. The Court permitted him to do it, notwithstanding the plaintiff’s objection. This we think was an

error, and, in the absence of any proof to the contrary, injury must be presumed to have resulted to the plaintiff, whereby he was prevented from having a fair trial of his case. We perceive no further prejudicial error, but for the reasons indicated, the judgment and order should be reversed, and the cause remanded for a new trial.

Disability of attorney to act on both sides.—An attorney is not permitted to serve professionally, both parties to a suit: *Sherwood v. Saratoga R. Co.* (1852), 15 Barb. (N. Y.) 650; *Herrick v. Catley* (1865), 30 How. Pr. (N. Y.) 208; s. c. 1 Daly (N. Y.), 512; *Price v. Grand Rapids R. Co.* (1862), 18 Ind. 137; *Branch v. Harrington* (1875), 49 How. Pr. (N. Y.) 196; *Warren v. Sprague* (1844), 4 Edw. Ch. (N. Y.) 416; *Valentine v. Stewart* (1860), 15 Cal. 387; *DeCetis v. Brunson* (1879), 53 Id. 372. Thus, he cannot represent, at the same time, a county and the commissioners against whom, at the county's instance, a writ of mandate is asked: *Clarke Co. v. Comm'rs* (1868), 1 Wash. Ter. 250. So, an attorney after once acting as such in a suit, cannot abandon his client's case and go over to the other side: *Valentine v. Stewart, supra*; *Com. v. Gibbs* (1855), 4 Gray (Mass.), 146; *Gaulden v. State* (1851), 11 Ga. 47; *Hatch v. Fogerty* (1871), 10 Abb. Pr. (N. Y.) 147; s. c. 40 How. Pr. (N. Y.) 492. He cannot be allowed to make use of the information he has gained, for the benefit of the opposite party: *Price v. Grand Rapids R. Co., supra*. In an Indiana case, the defendant in a criminal prosecution, filed an affidavit that he had engaged one F., a lawyer, to defend him; that he had disclosed to him the facts of his case and his evidence, etc. F. filed an affidavit, admitting the retainer, but denying that he had learned anything from defendant as

to his grounds or means of defence. The Court held that F. should not be allowed to assist in the prosecution, as it would be a defeating of the ends of justice: *Wilson v. State* (1861), 16 Ind. 392.

If, in the course of other business, the attorney has become acquainted with the secrets of another, he will not thereby be prevented from acting against him: *Price v. Grand Rapids R. Co., supra*. The fact that plaintiff's attorney officially, as an officer of the government, at a former time, held a different view of the law of the case from that afterwards advocated by him as such attorney, need not, of itself, disqualify him from accepting plaintiff's retainer: *Smith v. Chicago & Northwestern R. Co.* (1883), 60 Iowa, 515. Where the attorney to collect a note, was appointed by the defendant his attorney to confess judgment on it, he having full knowledge of the attorney's position, it was held not illegal: *Wassell v. Reardon* (1851), 11 Ark. 705, the Court saying: "As a general rule, it is true that agents cannot act so as to bind their principals, where they have or represent interests adverse to the principals." This rule is founded upon the consideration that the principal bargains for the skill and vigilant attention of the agent to the subject-matter intrusted to him; and the policy of the law will not tolerate the existence of an adverse interest in the agent to that of his principal, for fear it may influence his

conduct to the prejudice of interests of the principal. This well-recognized rule is particularly applicable to buying and selling agents, where the principal contracts for the services of an agent, at a time when he has no interest in the subject intrusted to him, but subsequently by his own act, acquires an interest in it, adverse to that of the principal. In the case before us, the attorney had no interest in the matter of his agency, unless it should arise from his claim to compensation as a collector, which may or may not have been otherwise settled; nor had the plaintiff any interest whatever in the act to be done, of which the principal at the time he instituted him agent, was not fully advised; and if such disqualification existed, he, by his own act, expressly waived it by conferring upon the agent such power, with a knowledge of the facts. When it is remembered that the whole ground upon which this rule is based, rests upon the fraudulent advantage which such an interest may stimulate the agent to take to the prejudice of his principal's rights, it will scarcely be contended that the circumstances of this case bring it within the reason and spirit of the rule. The principal was informed of the nature and extent of the interest which the payee in the note had in the act to be performed by the agent. The facts disclosed in the instrument itself prove this; and that it was intended that the act to be performed should inure to the mutual benefit of both the payer and payee; to the first, by saving him the expense incident to a suit in the usual form; to the other, by facilitating and making certain a recovery." And see *Sipes v. Whitney* (1876), 30 Ohio St. 69. And the fact that a contract is drawn up by and under the advice of one who is the counsel for both

parties, does not invalidate it, in the absence of fraud, and where the relation of the attorney was known to both: *Joslin v. Cowee* (1874), 56 N. Y. 626. The solicitor who files a bill for the appointment of a receiver, ought not to act as solicitor for the receiver; but if the defendant appears by the same solicitor in the suit by the receiver, as he did in the original suit, such appearance amounts to a waiver of all objections: *Warren v. Sprague* (1844) 4 Edw. Ch. (N. Y.) 416.

Disability to act in diverse capacities.—In like manner and for like reasons, an attorney is not permitted to act in diverse capacities. Thus, a solicitor in a cause has been held disabled from acting as a special master to execute the decree: *White v. Haffuker* (1862), 27 Ill. 349; an attorney, from acting as administrator of an estate, and at the same time as an attorney to collect a debt of the intestate: *Spinks v. Davis* (1856), 32 Miss. 152; a constable *de facto*, from acting as attorney in the case, whose summons he served: *Wilkinson v. Vorce* (1864), 41 Barb. (N. Y.) 370; *Knight v. O'Dell* (1859), 18 How. Pr. (N. Y.) 279; an attorney for the plaintiff, from issuing a writ as justice: *Ingraham v. Leland* (1847), 19 Vt. 304. And it has been held that counsel who represent private interests, cannot be retained to assist in criminal prosecutions growing out of such interests: *People v. Hurst* (1879), 41 Mich. 328. Where an attorney receives a large sum of money from his client as payment for services to be rendered to her, in and about the settlement of the estate of her deceased husband, he is bound at all times, to hold himself in readiness to render such services, disengaged from all complication with others, and to take no position against her, and not to appear as attorney and counsel for parties litiga-

ting with her, in relation to her rights or claims under the will, upon the estate of her husband: *Quinn v. Van Pelt* (1873), 36 N. Y. Super. Ct. 279.

The mayor of a city is not incompetent to act as its attorney: *Niles v. Muzzy* (1875), 33 Mich. 61; and the fact that an attorney, for clients having different interests, is enjoined for one, does not restrain his acting for others: *Slater v. Merritt* (1878), 75 N. Y. 268. An attorney may act as commissioner to take a deposition in the cause: *Taylor v. Branch Bank* (1848), 14 Ala. 633. The attorney for the mortgagee in a foreclosure suit, may appear also as attorney for a purchaser of the equity of redemption: *Wallace v. Furber* (1878), 62 Ind. 103. One who acts as counsel for a corporation, does not commit a breach of trust if he afterwards acts as counsel in a proceeding against a director, to recover money which the corporation has lost through a breach of the director's official trust: *Bent v. Priest* (1881), 10 Mo. App. 543. A commissioner to examine and allow claims against an insolvent savings bank, is not disqualified from acting as attorney for the assignee: *Hall v. Bracket*, (1880), 60 N. H. 215. The fact that an attorney is employed as an agent to negotiate loans, does not preclude him from rendering professional services to his principal: *Union Mutual Life Ins. Co. v. Buchanan* (1884), 100 Ind. 63. In a New York case, a lawyer was employed to, and did perform, certain services for a railroad company, in which he was a stockholder, in procuring the release of a mortgage upon its property, the surrender of certain of its bonds, the release of its liability on a contract, and the extension of a land grant, and in taking care of the surrendered bonds, etc., etc. Held, that the fact that he was a stockholder, did not preclude

him from sustaining the relation of attorney to the railroad company, being retained and recovering for the services in question: *Barker v. Cairo, etc. R. Co.* (1874), 3 Th. & C. (N. Y.), 328. Statutes prohibiting a director of a bank from acting as its attorney, have been held constitutional: *Walker v. Am. Nat. Bank* (1872), 49 N. Y. 659; *Dyer v. Sutherland* (1874), 75 Ill. 583.

Effect of such conduct.—The effects of the violation by the attorney of the rule of law prohibiting him from appearing on both sides of a case, or for diverse interests, are threefold.

1. It is such error in the trial of the cause in which the attorney appears, that if not prevented by the trial Court, will be good ground for a reversal on appeal; see the principal case and *Wilson v. State* (1861), 16 Ind. 392.

2. It will prevent the attorney from recovering his fees and charges for his services. An attorney representing one party in a negotiation, will not be allowed to receive compensation from the other party: *De Celis v. Brunson* (1879), 53 Cal. 372; *Orr v. Tanner* (1878), 12 R. I. 94. And this rule was applied in an action on a note given him by a husband, for services to both parties to a divorce suit; the payee, while attorney for the wife, having, at his request, persuaded her to dismiss the action; *MacDonald v. Wagner* (1878), 5 Mo. App. 56. An attorney employed to attend to certain specified litigation "and to all other litigations" concerning certain lands under a contract, who accepts and prosecutes an action for another party, whose interests are adverse to those of his employer, concerning the same land, if discharged by the latter, is not entitled to a specific performance of his contract with him: *McArthur v. Fry* (1872), 10 Kan. 233. A

receiver cannot act as his own counsel, so as to charge the estate for his services: *Bank of Niagara Case* (1836), 6 Paige (N. Y.) 213; *Adams v. Woods* (1857), 8 Cal. 321; [but a trustee, who is an attorney, is entitled to receive compensation for professional services rendered by him to the trust estate, *Perkins' Appeal* (1885), 108 Pa. 314;] nor can one member of a partnership, who is an attorney, charge the others for professional services about the firm's affairs, either before or after dissolution: *Milburn v. Codd* (1827), 7 B. & C. 419; *Vanduzer v. McMillan* (1867), 37 Ga. 299; *McCrory v. Ruddick* (1871), 33 Iowa, 521; nor can an attorney, who is a mortgagee, recover his costs, on his own foreclosure: *Sclater v. Cottam* (1857), 3 Jur. (N. S.), 630; *Patterson v. Donner* (1874), 48 Cal. 369; nor can a solicitor, who has an interest in attending to a cause, charge for his services, without an express agreement: *Martin v. Campbell* (1860), 11 Rich. Eq. (S. C.) 205; see *Deere v. Robinson* (1850), 7 Hare, 283. In New York, C. an attorney-at-law, agreed for a stated compensation, to conduct the contest of a will. Against the consent of his clients and without leave from them, he released, as their attorney, pending the suit, certain tracts of land and received from other parties money for so executing the release. In a suit brought by C. to recover the compensation agreed upon, the Court held that these facts showed a complete defence to C.'s claim under the contract: *Chatfield v. Simonson* (1883), 92 N. Y. 209. So, in Connecticut, the plaintiff, a counsellor-at-law, instigated the defendant with others, to engage in a riot and promised to defend them, if they were prosecuted. The defendant was prosecuted and employed the plaintiff to defend him. The plaintiff afterwards sued him for his services

and disbursements in defending him. It was held that he could not recover: *Treat v. Jones* (1859), 28 Conn. 334. So, if an attorney, after having obtained final judgment and execution, prevents the collection of the execution, by fraudulent conduct, this will be in violation of his duty as attorney and will deprive him of all legal claim for his services in procuring such a judgment and execution: *Brackett v. Norton* (1823), 4 Conn. 517.

3. So, appearing on both sides of a case or acting in diverse capacities, or taking fees from both parties, has been held to constitute a good ground for the disbarment of the attorney: *Jackson v. State* (1858), 21 Tex. 668; *In re Bowman*, St. Louis Ct. App. (1879), 8 Cent. L. J. 250. In a Nebraska case, pending a writ of error in the United States Supreme Court, in a capital case, the prisoner's attorney induced a United States commissioner to believe that he had power to issue a writ of habeas corpus and admit the prisoner to bail, whereby he got away. The attorney was dismissed from the bar: *State v. Burr* (1886), 19 Neb. 593. In Minnesota, an attorney, in whose hands a note had been placed for collection, agreed with the maker, without authority, that if she would board his law partner, he would indorse the amount on the note. His client repudiated this agreement, and collected the full amount of the note from the maker. The attorney never accounted to his client for the amount indorsed, and never repaid it to the maker. The Court held that this was wilful professional misconduct: *In re Temple* (1885), 33 Minn. 343. In California, an attorney in 1874, as district attorney, drew an indictment which the grand jury returned as a true bill. In 1881, he appeared as attorney for the defendant in the indictment. The Supreme Court held

that he was thus guilty of a "violation of his duty as attorney," and properly punished—no harm apparently having been intended—by three months' suspension from practice: *People v. Spencer* (1882), 61 Cal. 128. In another case in the same State, one C., who was city attorney, took appeals from judgments which had been given in certain cases against the city, which appeals were pending at the expiration of his term of office; after the expiration of his term of office, he asked one D., also an attorney, if a certain point had been raised in his cases. D. said "No," and in consideration that he would not be retained by said city to represent it in either of said cases, paid to him one hundred dollars; he agreed in consideration of such payment, and promised W. that he would not permit himself to be retained in either of said cases by the city. He performed no professional or other services for this payment and it was not expected that he should. The Court held this professional misconduct, justifying his disbarment: *Re Cowdery* (1886), 69 Cal. 32. In a very recent case in the same State, not yet reported, an accusation that respondent urged a prosecution for libel and promised to secure satisfactory evidence of the guilt of the defendant, and alleged that the Statute of Limitations had not run, and, at the examination, appeared for defendant and set up the Statute of Limitations and procured a writ of prohibition and defendant's discharge thereon, was held to show good ground for disbarment: *In re Stephens*, Cal. (1888). In regard to such acts as the above, it

is not essential that it should be shown, that the attorney committed them wilfully, intentionally, and knowing them to be wrong. As was said *In re Bowman, supra*, "An attorney committing them, was equally unfit to practice law, whether he knew them to be wrong or not. Who does not know that it is wrong for an attorney to take money on both sides? If there be any one who sincerely thinks that, having done so, he is in a better condition to take an impartial view of the matter in controversy, that he serves his client better, by being also in the service of the other side, and that it is therefore no harm for him to be secretly in pay of the enemy, or of the opponent, he is a moral idiot. But a moral idiot is not fit to practice law. No one is fit to do so who does not understand that there is no trust of a purely secular character more sacred than that created by the relation of attorney and client." In a proceeding of this character, the question is not necessarily as to the degree of moral turpitude; a case for disbarment may perhaps be imagined in which there should be little or none. But in *People v. Lamborn* (1834), 2 Ill. 123, the attorney had agreed to an entry of judgment against his client. It was held that having been specially employed to defend the suit, he had no right to do this without the consent or knowledge of his client. But, as it did not appear that the client had a legal defence, it was held that the motive might have been good and the charge was not sustained.

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ABSTRACTS OF RECENT DECISIONS.

AGENCY.

Good faith, of the highest degree, is required of an agent, and, if he negotiates a sale for his principal, he is bound to account for the full actual price received: *Jacobs v. George*, S. Ct. Ariz., Jan. 19, 1889.

BANKS AND BANKING.

Deposit by bank with another bank of money or securities, for the purpose of paying a creditor of the former, constitutes the relation of principal and agent between the banks, until the creditor assents to or acts upon the transaction; and where the creditor has no notice or knowledge of the deposit, his assent will not be presumed: *Brockmeyer v. Washington Nat. Bank*, S. Ct. Kan., Dec. 8, 1888.

BILLS AND NOTES.

Acceptance of draft for \$2000, does not cover a draft for \$2000, "with exchange on New York:" *Lindley v. First Nat. Bank of Waterloo*, S. Ct. Iowa, Jan. 23, 1889.

Notice of protest is sufficient, if properly addressed and placed in the post-office where the indorser is accustomed to receive his mail, upon the day of protest, and is actually received by the indorser on the following day: *Hendershot v. Nebraska Nat. Bank*, S. Ct. Neb., Dec. 13, 1889.

Delivery is not shown by evidence that a father, after difficulties had arisen between himself and his sons as to compensation for services rendered by the latter, by way of settlement made his notes to the sons, payable ten years after date, and promised to place them in charge of his wife; the notes were found five years after maturity among the papers of a deceased sister of the payees, but there was no explanation of her possession, nor was it shown that they were even in the possession of the payees or of their mother: *Gordon v. Adams*, S. Ct. Ill., Jan. 25, 1889.

Joint note was given for a debt and, at maturity, a partial payment was made on account and a new note given for the balance, which was invalid as to one of the makers on account of a material alteration; the latter remained liable for the unpaid balance upon the original note: *Owen v. Hall*, Ct. App. Md., Jan. 10, 1889.

BILLS OF LADING.

Stipulation that, in case of loss, the carrier shall have the benefit of any insurance on the goods, does not entitle the carrier to receive such benefit, or to a tender thereof, before an action can be brought against it for the loss, nor can a failure to give the carrier the benefit of such insurance avail as a counter-claim, unless it be shown that the

shipper had actually received the insurance money and Lad refused to allow the carrier the benefit of it: *Inman v. South Carolina Ry. Co.*, S. Ct. U. S., Jan. 14, 1889.

CONSTITUTIONAL LAW.

Railroad commission, authorized by statute to regulate charges for the transportation of passengers and freight, is not forbidden by a constitutional provision, which prohibits the delegation of legislative power: *McWhorter v. Pensacola & A. R. R. Co.*, S. Ct. Fla., Nov. 21, 1888.

Statute of Iowa, which provides that any one who has in his possession Texas cattle, which have not wintered north of the southern boundary of Missouri or Kansas, shall be liable for any damages that may accrue from allowing them to run at large and to thus spread Texas fever, is not an attempted regulation of inter-state commerce, nor does it deny to citizens of other States any rights and privileges accorded to citizens of Iowa: *Kimmish v. Ball*, S. Ct. U. S., Jan. 28, 1889.

CORPORATIONS.

Purchase by officer and director of debts owing by a corporation may be made, after an assignment for the benefit of creditors and a sale of all the assets: *Hammond's Appeal*, S. Ct. Pa., Jan. 7, 1889.

DAMAGES.

Fright and mental suffering are proper elements of damage in an action against a railroad company for unlawfully requiring a passenger, a woman, to leave a train at a dangerous point, several hundred feet from the station, in consequence of which she fell into a culvert and sustained injuries: *Stutz v. Chicago & N. W. Ry. Co.*, S. Ct. Wis., Dec. 4, 1888.

DEED.

Estate in entirety is given by a deed conveying real estate to a husband and wife, and upon the death of either, the survivor takes the whole estate: *Baker v. Stewart*, S. Ct. Kan., Dec. 8, 1888.

ELECTIONS.

Ballots constitute the best evidence of the choice of the voters, in an election contest, and if they have been preserved and protected from tampering, will control the evidence furnished by the official count, but the burden of proof rests upon the contestant to show that they have been kept intact, and are the identical ballots cast at the election: *Hartman v. Young*, S. Ct. Or., Dec. 19, 1888.

Erasure of printed name on a ballot, and writing opposite to the erasure another name, shows an intention to substitute the written for the printed name, and the ballot should be counted accordingly: *Fenton v. Scott*, S. Ct. Or., Dec. 20, 1888.

EASEMENT.

Appurtenances, used in deed, does not create an easement, where none existed before: *Bonelli v. Blakemore*, S. Ct. Miss., Dec. 3, 1888.

Right of way is an interest in lands and cannot be granted by parol, nor does it pass, when not of necessity, by a conveyance of the common owner: *Id.*

FIRE INSURANCE.

Arbitration clause in policy, providing that no suit "shall be sustained in any court of law or chancery until after an award of arbitrators shall have been obtained," fixing the amount of loss, is void, as ousting the courts of their legitimate jurisdiction: *German-American Ins. Co. v. Etherton*, S. Ct. Neb., Jan. 16, 1889.

Breach of contract to insure made with the agent of an insurance company, will support an action of damages against the company, although no premium was paid: *Campbell v. American Fire Ins. Co.*, S. Ct. Wis., Dec. 4, 1888.

Waiver of forfeiture for non-payment of premiums, when due, may be constituted by habits of business on the part of an insurance company, which tend to create in the mind of a policy-holder the belief that payment may be delayed until demanded: *Home Protection of North Alabama v. Avery*, S. Ct. Ala., Dec. 7, 1888.

Wife cannot maintain action upon a policy on her separate property, taken out in the name of her husband: *Zimmerman v. Farmers' Ins. Co.*, S. Ct. Iowa, Dec. 21, 1888.

HUSBAND AND WIFE.

Money given by wife to husband, to be employed in his business to the best advantage, belongs to him, and does not constitute a valuable consideration for conveyance by him to her: *Diggs v. McCullough*, Ct. App. Md., Jan. 9, 1889.

INSOLVENCY.

Discharge by an insolvent Court of one State is no bar to an action by a creditor, who is a citizen of another State and was not a party to the insolvency proceedings: *Main v. Messner*, S. Ct. Or. Nov. 20, 1888.

LIBEL.

Newspapers are not privileged in the publication, before trial, of pleadings or other proceedings in civil causes: *Park v. Detroit Free Press Co.*, S. Ct. Mich., Nov. 28, 1888.

LIFE INSURANCE.

Notice of assessments by a mutual benefit association, according to the practice adopted, was always sent to a particular class of members by letter through the mail, although the charter of the association provided

only for notice by posting; a failure to send such notice would estop the association from claiming a forfeiture, where a member who was not notified, had failed to pay his assessment within the time limited: *Gus-ther v. New Orleans C. R. Mut. Aid Asso.*, S. Ct. La. Nov. 19, 1888.

Paid-up policy, issued in pursuance of an express agreement in a prior policy, without new consideration, is not a new contract, so as to be affected by a change in the constitution of the insuring company, made between the dates of the two policies, which abolishes individual liability of stockholders for the debts of the company: *McDonnell v. Alabama Gold L. Ins. Co.*, S. Ct. Ala., Dec. 5, 1888.

LIQUOR LAWS.

Older cannot be held, as a matter of law, not to be a vinous or spirituous liquor, within the prohibition of a license law, but the question is one of fact, to be determined by a jury: *Commonwealth v. Reyburg*, S. Ct. Pa., Jan. 14, 1889.

Conviction for selling liquor without a license does not bar a prosecution for selling to a minor, although both indictments are based upon the same sale: *Ruble v. State*, S. Ct. Ark., Jan. 12, 1889.

MARINE INSURANCE.

Abandonment is accepted, where an insurer, after notice of the abandonment, gets the vessel off, brings it to port, repairs it at great expense and never offers to return it, believing the loss to have been caused by a peril covered by the policy, and the insurer cannot afterwards deny its liability: *Richelieu & O. Nav. Co. v. Thames & M. Ins. Co.*, S. Ct. Mich. Nov. 28, 1888.

Insurable interest is had by a part owner of a vessel for advances and disbursements made by him upon a venture engaged in with such vessel by himself and the other owners; he is in the position of a partner making advances to his firm, and has a lien on the vessel and cargo for his reimbursement: *International Marine Ins. Co. v. Winsmore*, S. Ct. Pa., Jan. 28, 1889.

MARRIAGE.

Statutory prohibition of re-marriage of the guilty party, after a divorce for adultery, renders such marriage void in Tennessee, when the parties, although domiciled in that State, for the purpose of evading the statute, are married in Alabama, where such marriage is not prohibited: *Pennegar v. State*, S. Ct. Tenn., Jan. 29, 1889.

NEGOTIABLE INSTRUMENTS.

Collateral note, containing a power to the payee, upon non-payment, to sell the pledged securities, is not negotiable: *Continental Nat. Bank v. Wells*, S. Ct. Wis., Jan. 29, 1889.

Order for payment of school funds is not negotiable, and a third person can acquire no greater right under it than belonged to the original holder: *Shakespeare v. Smith*, S. Ct. Cal. Dec. 29, 1888.

Stock certificate is not negotiable, any usage among stock-brokers to the contrary notwithstanding, and an innocent purchaser for value of a certificate, indorsed in blank by the owner and stolen from him without negligence on his part, acquires no title: *East Birmingham Land Co. v. Dennis*, S. Ct. Ala., Jan. 15, 1889.

PHYSICIANS.

Surgical operation upon a married woman may be performed, where the attending physicians, after consultation, deem it necessary and the patient consents, notwithstanding the fact that the husband's consent is not given: *State v. Housekeeper*, Ct. App. Md., Jan. 10, 1888.

RAILROADS.

Public use, such as will authorize the exercise of the right of eminent domain, does not exist, where land is sought to be condemned for the purpose of building thereon a switch or branch road, to reach a private manufactory, for the purpose of transporting freight thereto from the main line of a railroad: *Pittsburgh, W. & K. R. Co. v. Benwood Iron Works*, S. Ct. W. Va., Dec. 15, 1888.

Sick passenger may be removed from a car, but not without due care and provision for his safety; so, where one riding in a street car and stricken with apoplexy, attended with severe vomiting, to the discomfort of other passengers, was removed, while in a speechless and helpless condition, and laid in the open street, on a bleak, drizzling December day, and there abandoned with no effort to procure him attention, there was a gross violation of its duty by the railroad company, and it was liable for the resulting damage: *Conolly v. Crescent City R. R. Co.* S. Ct. La., Dec. 8, 1888.

Punitive damages may be recovered by a woman, who got on a railroad train, having purchased a ticket to the station nearest her home, but was carried past such station by the failure of the train to stop there; she requested to be put off at her destination, but the conductor refused, and upon her declining to go to the next station, stopped the train; she then alighted, the conductor offering no assistance, but addressing her in a rude and insulting manner; she was compelled to walk back about a mile to the station to which she had purchased her ticket, carrying a bundle and valise, her route lying through an uninhabited country; and, as a result of her walk and excitement, was sick for several days: *Louisville & N. R. R. Co. v. Ballard*, Ct. App., Ky., Jan. 22, 1889.

STATUTE OF FRAUDS.

Para. agreement by purchaser of property to pay the price to a third person in liquidation of a debt due the latter by the vendor, is not within the statute, and an action may be maintained upon the agreement by such third person: *Piano Manufacturing Co. v. Burrows*, S. Ct. Kan., Dec. 8, 1888.

STOCK-BROKERS.

Refusal to sell stocks, when directed by telegraph by principal to do so, such refusal being communicated to the principal, not by telegraph, but by letter delivered two days later, renders a broker liable for the loss resulting from his failure to obey instructions, although his principal is indebted to him for previous advances in a greater sum than the market value of the stocks: *Gallagher v. Jones*, S. Ct. U. S., Jan. 21, 1889.

TAXATION.

Franchise granted by the United States is not subject to State taxation: *San Benito Co. v. Southern Pacific R. R. Co.*, S. Ct. Cal., Dec. 13, 1888.

TRUSTS.

Resulting trust arises where a testator, desiring that his property should go to his own heirs, is induced by his wife to give her some of the personalty and to devise and bequeath the residue of his estate to her absolutely, upon her promise to use it for certain purposes during her life and transfer all that should remain to his heirs, which promise she failed to perform; and such trust will be enforced in equity, notwithstanding the statute of frauds: *Gilpatrick v. Glidden*, S. Jud. Ct. Me., Dec. 27, 1888.

USURY.

Advance by commission merchants for the purchase of goods, the borrower agreeing to pay, in addition to interest, a commission upon sales of 50 per cent. more than the customary price charged, where no money is advanced, is a usurious transaction: *Harmon v. Lehman*, S. Ct. Ala., Dec. 18, 1888.

WILLS.

Declarations of testator, made within a reasonable time before and after the execution of a will, are admissible, in an issue to try questions of fraud and undue influence, as showing the condition of his mind, though they have no force to establish the fact of undue influence; but in order that such declarations may be considered, there must be proof of other facts and circumstances supporting the allegations of fraud and undue influence: *Herster v. Herster*, S. Ct. Pa., Jan. 7, 1889.

Estate in fee simple is given, where a testator, after using the following introductory words: "Touching such worldly estate wherewith it hath pleased God to bless me, I give and dispose of in the following manner," and after giving legacies to each of his children and heirs-at-law, except one son, each bequest ending with the words, "and no more," devises to the excepted son all his real estate, omitting the clause, "and no more," but using no words of inheritance: *Doe v. Patten*, Ct. Err. & App. Del., Jan. 16, 1889.

JAMES C. SELLERS.

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COMMERCIAL AGENCIES.

I. WHEN THEIR COMMUNICATIONS ARE PRIVILEGED.

[In THE AMERICAN LAW REGISTER for November, 1887 (Vol. xxvi., N. S. 681-93), a review of the cases upon this subject established that special reports made by a commercial agency to its subscribers, upon application, are privileged, even though conveyed through the medium of clerks or agents; and reports furnished to all subscribers through "notification sheets" were of doubtful privilege. The following review of the cases, in the light of all the decisions to date, finally establishes the legal principle that "notification sheets" are not privileged, when made to all subscribers.]

In the earliest reported case, *Goldstein v. Foss* (1826), 2 C. & P., 252; s. c., 12 E. C. L. 556, the Secretary of "The Society for the Protection of Trade against Swindlers and Sharpers," whose business it was to inquire into the character and commercial standing of proposed members, reported to the members of the society that the plaintiff, a tradesman, was an improper person to be balloted for as a member. It was held that the communication was defamatory and not privileged.

In *Commonwealth v. Stacey* (1871), 8 Phila. (Pa.) 617, an agency had sent to all its subscribers a "notification sheet," containing the names of persons whose commercial ratings should be changed from those given in a book previously furnished. The sheet gave no particulars, but instructed subscribers who were specially interested, to call at the office of

the agency, for information. The court held that the communication was not privileged, and, in the course of its opinion, said: "There is no great hardship imposed on an agency of this kind, if they are required to know beforehand that their statements are true, and that the persons to whom they are sent have an interest in receiving the information."

But the generally accepted rule of law applicable to communications by commercial agencies is contrary to the doctrine of the foregoing cases. In the case of *Erbcr v. Dun* (U. S. C. Ct., E. D. Ark., 1882), 12 Fed. Repr. 526 (quoted in *Locke v. Bradstreet Co.* (U. S. C. Ct., D. Minn., 1885), 22 Fed. Repr. 771), the correct rule is thus stated: "A communication is privileged within the rule, when made in good faith, in answer to one having an interest in the information sought, and it will be privileged if volunteered, if the party to whom the communication is made, has an interest in it, and the party by whom it is made, stands in such relation to him as to make it a reasonable duty, or at least proper that he should give the information." See, also, *Trussell v. Scarlett* (U. S. C. Ct., D. Md., 1882), 18 Fed. Repr. 214; *Ormsby v. Douglas* (1868), 37 N. Y. 477; *King v. Patterson* (1887), 49 N. J. L. 417 (see a brief review of this case in 26 AMERICAN LAW REGISTER, N. S., 689-90); *State v. Lonsdale* (1880), 48 Wis. 348; *Bradstreet Co. v. Gill*, Sup. Ct. Tex., Nov. 27, 1888, 28 AMERICAN LAW REGISTER, 125.

The communications of commercial agencies are not entitled to any greater privilege than communications by other persons. If "unrestrained by those legal principles which control the acts and conduct of other persons under like circumstances, these agencies, in the vastness of their operations, might become instruments of injustice and oppression so grievous that public policy would require their entire suppression." *King v. Patterson* (1887), 49 N. J. L. 417.

"A commercial agency is a lawful business, and when conducted lawfully, is a benefit to society and trade; but no just reason can be given for a rule that would exempt it from liability for false and defamatory publications, when other citizens would not be exempt. If an individual voluntarily, or for profit, give false and injurious information to persons interested in the trade and commercial standing of another, at the time

the information is given, such communication would be privileged; but if he furnish the same information to others not so interested—to traders and merchants as a class—the communication would not be privileged. A commercial agency organized for the purpose of furnishing such information, keeping an intelligence office for profit, should, it seems to us, be held to the same accountability as an ordinary citizen. The acts of the agency properly done, are no more meritorious or beneficial than when done by an individual, except that they may be more extended and cover more transactions. Impartial justice cannot imagine a sound reason for a distinction in favor of an agency. It amounts to this, at last, and no more: the business of a commercial agency is lawful when conducted lawfully. It will be protected so long as it does not transgress the rights of others. It is not entitled to any privilege denied the ordinary citizen. If it is a greater benefit to trade than the occasional acts of the individual, because more extended and continuous in its operation, it is for the same reason capable of doing more harm by its false reports. Its wrong-doing is more difficult to remedy. Because it has a monopoly of such intelligence, is no reason for giving it a privilege to do wrong by an improper publication of false statements, though the publication may be in the usual course of business it has adopted. It has the right, then, to the protection of a privileged communication when made to persons at the time interested in the information, even though the information may be false; but when communicated to its general subscribers, it has no such right." *Bradstreet Co. v. Gill*, Sup. Ct. Tex., Nov. 27, 1888, 28 AMERICAN LAW REGISTER, 125.

Again it has been said that, "The publication of defamatory matter affecting third persons, in a business prosecuted for personal gain, can be tolerated only on grounds of public convenience. The rights of individuals ought not to be made to yield to the exigencies of such a business, more than public interests require. Public interests will be adequately conserved by extending the immunity of privileged communications only so far as to embrace communications to subscribers who have special interest in the information. This restriction lays no unreasonable restraint upon the business of the agencies in

collecting and communicating information in the interest of the public." *King v. Patterson* (1887), 49 N. J. L. 417.

It follows from the foregoing principles of law, that communications made by an agency in "notification sheets" to all of its subscribers, without regard to whether they have a special interest therein, are not privileged: *Erber v. Dun* (U. S. C. Ct., E. D. Ark., 1882), 12 Fed. Repr. 526; *Taylor v. Church* (1853), 8 N. Y. 452; (see a review of this case, 26 AMERICAN LAW REGISTER, N. S. 682;) *Commonwealth v. Stacey* (1871), 8 Phila. (Pa.) 617. Nor are such communications privileged because the subscribers have contracted to treat the information as strictly confidential: *King v. Patterson* (1887), 49 N. J. L. 417 (VAN SYCKEL, J., dissenting in an able opinion). Nor because they are printed in a cipher, the key to which is furnished to subscribers only: *Sunderlin v. Bradstreet* (1871), 46 N. Y. 188. (See, also, 26 AMERICAN LAW REGISTER, N. S. 690-1.)

In the latest reported case, a commercial agency had furnished to its subscribers generally, a book containing the ratings of merchants. The space opposite the plaintiff's name was blank, indicating that he had no business standing. It was held that the communication was defamatory and not privileged: *Bradstreet Co. v. Gill*, Sup. Ct. Tex., Nov. 27, 1888, 28 AMERICAN LAW REGISTER, 125.

It has been urged that a defamatory communication is not privileged, unless made directly by the *proprietor* of the agency. In *Beardsley v. Tappan* (U. S. C. Ct., E. D. N. Y., 1867), 15 Blatch. 497, it appeared that the agency kept a record of the ratings of business men and firms, which was used by a number of clerks in answering inquiries made by subscribers. The Court said: "I am strongly inclined to think that, if the establishments are to be upheld at all, the limitation attached to them by the Court below is not unreasonable; to wit, that it must be an individual transaction and not an establishment conducted by an unlimited number of partners and clerks. The principle upon which privileged communications rest, which of themselves would otherwise be libelous, imports confidence and secrecy between individuals, and is inconsistent with the idea of a communication made by a society or congregation of persons or by a private company or a corporate body."

This case has been justly criticised: "The charge of the trial judge and the reasoning of Mr. Justice NELSON place unreasonable restrictions upon the doctrine of privileged communications. Agents to collect information, clerks to record it and to communicate it to subscribers, on the one hand, and confidential clerks to receive the information in the interest and by the authority of subscribers, on the other hand, are absolutely necessary to the usefulness, if not the existence, of these institutions:" *King v. Patterson* (1887), 49 N. J. L. 417. And in *Erber v. Dun* (U. S. C. Ct., E. D. Ark., 1882), 12 Fed. Repr. 526, referring to the opinion in *Beardsley v. Tappan* (1867), 5 Blatchf. (U. S. C. Ct., E. D. N. Y.), 497, it was said: "Courts should not close their eyes to the necessary and uniform method of conducting business among merchants and other business men and corporations, and no rule should be adopted that will render impracticable resort to these necessary and convenient methods in any particular instance or branch of their business, unless some principle imperatively demands it, or it can be shown some good results will flow from it, results actually different and better than obtain under existing methods. * * * * * The distinction attempted to be drawn between the right to resort to the services of an agent in this business and other legitimate business pursuits, is not well founded. It is not in harmony with the known and universal methods of conducting business. Commercial and other business pursuits are conducted chiefly by partnerships and corporations, and the former often, and the latter always, can act only by agents; and any rule of law that would deny to them the right to avail themselves of the services of an agent, in every department of their business and for every legitimate purpose connected with it, is unsound."

II. MALICIOUS REPORTS.

"A communication which would otherwise be privileged, is not so, if made with *malice in fact*—that is, through hatred, ill-will and a malicious desire to injure; and a statement privileged in the first instance, may lose its privileged character by being repeated and persisted in, after knowledge of the fact that it is false and erroneous, has been brought

home to its author:" *Erber v. Dun* (U. S. C. Ct., E. D. Ark., 1882), 12 Fed. Repr. 526.

A defamatory communication is not privileged, if reasonable care and caution was not exercised in collecting the information and it was imparted to others recklessly, without reason to believe it true: *Locke v. Bradstreet Co.* (U. S. C. Ct., D. Minn., 1885), 22 Fed. Repr. 771; *Bradstreet Co. v. Gill* (Sup. Ct. Tex., Nov. 27, 1888).

The burden of proof is upon the commercial agency, to show that the communication is *prima facie* privileged; but where its privileged character is shown, the burden of proof is upon the other party, to show that it was made with malice in fact: *Erber v. Dun* (U. S. C. Ct., E. D. Ark., 1882), 12 Fed. Repr. 526; *Ormsby v. Douglas* (1868), 37 N. Y. 477.

III. LIABILITY TO SUBSCRIBERS.

Commercial agencies are bound to use ordinary care and diligence in collecting the information which they furnish to subscribers. Ordinarily, if they fail to do this, they are liable in damages to the injured subscriber who has been misled by their representations. The diligence required is that of "good business men in the particular specialty:" *Gibson v. Dun*, Ct. C. P. Hamilton Co., Ohio, 1876. In the case cited, a subscriber sued the agency for negligence in failing to make inquiry as to recorded incumbrances on the title to real estate, which the agency reported to be in the name of a customer of the subscriber, whereby the latter was induced to give credit, to his injury. The Court said: "The testimony shows, that according to the practice of all mercantile agencies in the United States, such inquiry is never undertaken, such information is never given, unless specially asked for, and in such case the cost of making such inquiry is paid in addition to the usual fees."

In a Canadian case, *McLean v. Dun* (1877), 1 Ont. App., 153, it was held that an agency was not liable to its subscribers for giving false information *verbally*. This was under an act similar to "Lord Tenterden's Act" (9 Geo. IV. 14), which recited that "No action shall be brought to charge any person, upon or by reason of any representation, or assur-

ance, made or given, concerning or relating to the character, conduct, credit, ability or dealings of any other person, to the intent or purpose that such other person may obtain money, goods or credit therefor, unless such representation or assurance be in writing, signed by the party to be charged therewith."

In a similar case in Pennsylvania, upon a cause of action arising in Alabama, where a similar statute was in force, the court held, that the action would lie, on the ground that the statute was intended to be a shield in cases of honest mistake merely, and not against misfeasance or negligence: *Sprague v. Dun* (1878), 12 Phila. (Pa.) 310.

A commercial agency may limit its liability to its subscribers; and a clause in the contract exempting it from liability for the negligence of its agents, protects it against gross negligence, even on their part: *Duncan v. Dun* (U. S. C. Ct., E. D. Pa., 1879), 9 Cent. L. J. 151; s. c., 7 W. N. C. (Pa.) 246.

IV. FALSE REPRESENTATIONS TO COMMERCIAL AGENCIES.

Not infrequently false representations are made to commercial agencies, for the purpose of increasing or sustaining the credit of the persons making them. It would seem proper, that where such statements are communicated to a subscriber of an agency, who is induced thereby to extend a credit that would not otherwise be given, the subscriber might treat the transaction as tainted with fraud, as fully as where the representation is made directly to himself. But it has been held on two occasions, that "where the only representations made, are those furnished to sellers by the agencies, it must be clearly shown that the accused buyer made the statements to the agency with fraudulent intent to use such agency as an instrument in accomplishing a fraud upon his vendor or some other dealer." *Victor v. Henlien* (1884), 33 Hun. (N. Y.) 549; *Deickhoff v. Brown* (Ct. App. Md., Jan. 1886), 21 Repr. 583.

V. SERVICE OF PROCESS.

In *Bradstreet Co. v. Gill*, Sup. Ct. Tex., Nov. 27, 1888, the question arose as to whether service of process upon one who

sometimes furnished a commercial agency with statements of the business standing of merchants in the county, came within the statute providing for service of process upon agents of foreign corporations. It was said that: "The court [below] should have instructed the jury, that if Finney was employed or engaged by the company as its correspondent at the time the suit was brought, to furnish it with information as to the commercial standing of business men in Bastrop county, to be used by the company in its reports to its customers and subscribers in conducting the business of the company, then he would be its agent, and he being a resident of the county, the court has jurisdiction of the case. * * * * If relations exist which will constitute an agency, it will be an agency, whether the parties understood it to be or not. Their private intention will not affect it."

CHARLES A. ROBBINS.

Lincoln, Neb.

STATUTES RELATING TO TELEPHONES.

(Continued.)

Nebraska, by chap. 10 of the General Laws of 1887, p. 123 (approved March 30, 1887), in designating and regulating cities having a population of sixty thousand inhabitants, or upwards, as cities of the metropolitan class, provides—

SAC. 50. The Mayor and Council shall have power to regulate and provide for the lighting of streets, laying down gas pipes, and erection of lamp posts, electric towers, or other apparatus, and to regulate the sale and use of gas and electric lights, and fix and determine the price of gas, the charge of electric light, and the rent of gas metres within the city, and regulate the inspection thereof, and to regulate telephone service and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connections, and to prohibit or regulate the erection of telegraph, telephone, or electric wire poles in the public grounds, streets, or alleys, and the placing of wires thereon, and to require the removal from the public grounds, streets or alleys of any or all such poles, and require the removal and placing under ground of any or all telegraph, telephone, or electric wires.

By chap. 87, General Laws of 1887, p. 634, being “an act, granting the right of way to telegraph or telephone companies along public highways, and providing for a penalty in case of malicious injury or interference with the same” (approved March 30, 1887), it is enacted—

SECTION 1. That any telegraph or telephone company, incorporated or doing business in this State, shall be and is hereby granted the right of way along any of the public roads of this State for the erection of poles and wires; *Provided*, That poles shall be set at least six feet within the boundary line of said roadway, and not placed so as to interfere with road crossings; and *Provided*, That said wires shall be placed at the height of not less than twenty feet above all road crossings.

SAC. 2. Any person or persons who shall break, injure, destroy, or otherwise interfere with the poles, wires or fixtures of any telegraph or telephone company in this State, shall be subject to action and penalty prescribed in section 98, chapter 13, Criminal Code.

New Hampshire has “An act to legalize the erection of telegraph and telephone poles and wires, and similar structures for electric lighting,” approved 9th August, 1881 (chap. 54, Laws, p. 472).—

SEC. 1. The proprietors of any telegraph line, or of any telephone exchange, or line of telephones used for the transmission of spoken messages, by means of the electric speaking telephone, or of lines for establishing electric lights in this State, may erect and maintain the necessary poles and structures, and stretch the necessary wires for the use of such telegraph line or telephone exchange, or line of telephones, or line for electric lighting, over, across, and along any public highway in this State, or may lay the same under the surface of any such highway.

SEC. 2. Such telegraph, telephone, or electric lighting poles, structures and wires shall be erected and maintained subject to the provisions of chapter 80 of the General Laws of this State relating to telegraphs, which are hereby made applicable to lines of wire for telephonic and electric lighting purposes; and no poles, structures or wires are hereby authorized that shall in any way impede or obstruct the free and safe use of any highway for public travel, nor that shall interfere with or obstruct the safe, free, and convenient use of, or access to or from, any lands or buildings adjoining or near such highway; and no such poles or other structures shall be erected, or wires stretched, by any of such proprietors, on, over, or across the lands or buildings of any individuals, or corporations, without their consent; and no right shall be acquired by the use of wires stretched on, over, or across the lands or buildings of any such individual or corporation, for any length of time.

SEC. 3. Whenever any such proprietors shall desire to erect their poles or structures, or to stretch their wires, they may apply by petition to the Mayor and aldermen of any city, or the selectmen of any town, in which such poles or structures are to be erected or wires stretched, to locate the route of the lines for such telegraph, telephone, or electric lighting, on, over, and along the public highways in such town or city, and to grant license therefor, upon such conditions as the public good may require.

SEC. 4. The Mayor and aldermen, or the selectmen, shall have the power to grant such license, and may fix and limit the size and location of such poles and structures, their distances from each other, the height from the ground that such wires may be stretched, and the number of wires that may be so used, and the time for which the license shall continue in force, and may revoke the same whenever the public good shall so require, and from time to time, upon like application of such proprietors, or by any person whose rights or interests are affected, may alter and change the location of such poles or structures, and the height and size of the same, as well as the height and number of wires, or may revoke the said license, if proper cause is shown; and all proceedings of the Mayor and aldermen, or selectmen, under this act, shall be subject to the supervision of the Supreme Court, on application of any person interested or aggrieved.

SEC. 5. No such poles or structures shall be erected, or wires stretched in any way so as to interfere with any other similar structure.

SEC. 6. If any person shall be aggrieved or damaged by the erection of such poles or structures, or by the stretching of such wires, or by the use made of the same, he may apply to the Mayor and aldermen, or the selectmen, to assess the damages which he claims are occasioned thereby, who shall give notice to such proprietors and all others interested, and after hearing all parties may award such damages as may be legally and justly due.

SEC. 7. If said Mayor and aldermen, or selectmen, shall neglect or refuse to make such award, or either party shall be dissatisfied therewith, or said proprietors shall neglect or refuse to pay the same within thirty days after such award is made, either party may apply to the Supreme Court for relief, and like proceedings shall be had as in case of appeals from the laying out of highways and the assessment of damages therefor.

SEC. 8. Proceedings, as provided by this act, may be taken on petition to the Mayor and aldermen, or selectmen, in case any proprietors aforesaid shall desire to lay their wires under the surface of any highway, or in case any person interested or affected by such poles, structures or wires, or the use made thereof, shall petition therefor.

SEC. 9. Similar proceedings may be had by any such proprietors for locating and licensing any such telegraph, telephone, or electric lighting lines, already constructed, or for changing or altering the location of such lines as may have been heretofore erected.

SEC. 10. Nothing herein contained shall exempt any such proprietors from liability for any unlawful entry, trespass, or damage already made or committed, nor from any liability or damage that may occur from want of care or from negligence in erecting or maintaining such poles, structures or wires.

SEC. 11. Such proprietors of any telephone or telegraph lines shall open and maintain, at some convenient point or points, offices or places where any person desiring so to do may use such telephone or telegraph line for communication to all points reached by such line or its connections, on payment of a reasonable fee for such use; and if any such proprietors shall neglect or fail so to open and maintain such offices or places, any person aggrieved may apply to the Supreme Court, by petition, for redress, and the Court shall make such orders and issue such decrees as justice may require.

SEC. 12. Such proprietors of any electric lighting apparatus or lines shall furnish the means of lighting by such electric light to all persons within the reach thereof and applying therefor, upon similar terms and conditions, without discrimination and at reasonable rates; and any person aggrieved by the neglect or failure to furnish such means, at such rates, may apply to the Supreme Court by petition, for redress, and the Court shall make such orders and decrees as justice may require.

SEC. 13. The use of the highways of this State by telegraph, telephone and electric lighting poles, structures and wires, under and in accordance with the provisions of this act, is hereby declared to be a public use of such highways.

SEC. 14. This act shall take effect upon its passage.

New Hampshire also provides, by "An act for the taxation of telephone companies" (chap. 110, Laws, 1883, page 89, act approved 15th September, 1883),—

SEC. 1. Every telephone corporation, company or person doing business within this State, shall pay an annual tax, as near as may be in proportion to the taxation of other property throughout the State, on the value of any telephone line or lines owned or worked by such corporation, company or person within this State,

including all poles, wires, insulators, transmitters, telephones, batteries, instruments, telephonic apparatus, office furniture and fixtures.

SEC. 2. The State board of equalization shall appraise the said lines, apparatus, office furniture and machinery at their actual value, and assess such corporation, company or person on said valuation, at the average rate of taxation of other property throughout the State. Such assessment shall be made and certified to the State treasurer by the thirtieth day of September. The State treasurer shall thereupon notify said parties against whom the tax is assessed, and the same shall be paid into the treasury on or before the thirtieth day of October. If any tax so assessed is not paid by the said thirtieth day of October the State treasurer shall issue his extent for the same, and all property of the delinquent corporation, company or person, on the first day of April preceding, shall be liable for its payment.

SEC. 3. This act shall take effect from its passage.

New Jersey has provided for the designation of route, by an act approved 27th April, 1888 (chap. 337, Laws, page 546),—

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey,* That sections one and two of the act, of which this is amendatory, be and the same are hereby amended to read as follows :

1. *Be it, etc.,* That whenever any telegraph or telephone company, organized by virtue of the act to which this is a further supplement, or by virtue of any special act, shall apply to the Common Council, township committee, or other legislative body of any city, town, township, village or borough in this State (the Common Council, township committee, or other legislative body of which is authorized by law to take and appropriate lands or real estate for the opening, laying out or constructing streets therein, and to make awards for lands or real estate taken therefor, and to levy assessments for benefits or expenses of such improvements, by a board of assessment or otherwise), through which it is intended to construct or extend any telegraph or telephone line, for a designation of the street, streets or highways, in or upon which the posts or poles of said company may be erected, it shall be the duty of such Common Council, township committee or other legislative body to give to such company a writing, designating the street, streets or highways in which the posts or poles of said company shall be placed, and the manner of placing the same, subject in other respects to the provisions of the act to which this is a supplement; the street, streets or highways to be designated as aforesaid shall be such as form a practicable and suitable continuous route for the line of said company through such municipality, commencing and ending upon a public highway, and shall be designated with due regard to the improvement of facilities for telegraphic or telephonic communications; in case such Common Council, township committee, or other legislative body shall not, within fifty days from the time of the making of such application, give to such company a writing, designating the street, streets or highways in which the posts or poles of such company may be erected, and the manner of placing the same, as hereinbefore provided, it shall be lawful for such company to apply to the Circuit Court of the county in which such city, town, township, village or borough is situate, or to the judge thereof in vacation, and such Court or the judge thereof, after a hearing

upon twenty days' notice to such Common Council, township committee or other legislative body, which notice shall be published at least once a week, for two weeks, in a newspaper in which the ordinances of such city, town, township, village or borough are published according to law, or in case there is no such official newspaper, then in a newspaper published in the county, to be designated by said Court or judge, shall, as speedily as possible, hear the matter in question, and may, in the discretion of said Court or judge, designate the street, streets or highways in which the posts or poles of such company may be erected and the manner of placing the same, which designation shall have the same force and effect as if made by the legislative body of said city, township, village or borough.

2. *And be it enacted*, That it shall be unlawful for any telegraph or telephone company to construct or extend any telegraph or telephone line, or to erect any posts or poles therefor, in any city, town, township, village or borough, having the powers enumerated in the first section of this act, without first obtaining such designation of their route, and then only upon the street, streets or highways so to be designated.

2. *And be it enacted*, That this act shall be deemed a public act and shall take effect immediately.

The Act so amended, was itself an amendatory act, approved 1 April, 1887 (Chap. 87, Laws, page 119), and also provided—

3. *And be it enacted*, That the designation of such route provided for in the first section of this act, shall, in all cases, be made by ordinance, where the legislative body of any of the municipal corporations hereinbefore designated, are authorized by law, to enact ordinances for any purpose whatever.

4. *And be it enacted*, That this act shall be deemed a public act, and shall take effect immediately.

The original act was one "to incorporate and regulate telegraph companies" (Revision of 1877, page 1174), and was further amended by a supplement approved 11 March, 1880 (Laws, page 201: Supp. to Revision, 1877-1886, page 1022),—

2. *And be it enacted*, That in case of the refusal of any of the owners of the soil, on the line of the route, to permit the use of any road or highway, for the purpose of erecting posts or poles on the same, to sustain the wires or other fixtures, in case where consent is necessary to be obtained, it shall be lawful for such company to present a petition to the circuit court of the county, in which said road or highways are situate, or to judge thereof in vacation, setting forth the privilege, or right of way, the names of the owners of the soil, if known, and if not known, or non-resident of the State, that fact shall be stated, and the names of any number of owners or any number of descriptions of the premises desired, may be mentioned in one petition; whereupon the said court shall fix the time and place for the hearing of the matter contained in said petition, and direct notice thereof to be served on the person or persons, or corporations interested, at least six days prior to said hearing, such service to be made in the same manner as writs of summons, issued out of

said court, are served; or if the owner be unknown, or non-resident in this State, such notice shall be published in a newspaper in said county for the like period, or for such longer period as the court may direct; and in case the post office address of such non-resident owner can be ascertained, a copy of such notice shall be mailed to him or her (postage prepaid), under the direction of said court; at the time mentioned for said hearing the said court (unless good cause to the contrary appear), shall appoint three disinterested freeholders, residents of said county, commissioners to assess and appraise the damages which such owner or owners may sustain, by reason of the erection and establishment of such telegraph line; before entering upon the service, said commissioners shall severally be sworn faithfully and impartially to perform the duties required of them, and shall, on view, make a just appraisal in writing, of the damages, if any, sustained by such owner or owners, and file a report thereof, in the office of the clerk of said court; if any damages are assessed, the company shall pay or tender the amount of the same to the party to whom the award is made; if such owner be unknown, or cannot be found, they shall pay the same into the said court; and thereupon, or if no damages are found to be sustained, the said company shall have full power to use such road or highway, on the line of their route, for the purpose of erecting posts or poles on the same, to sustain their wires and other fixtures; said commissioners shall each receive three dollars for each day's service performed by them, to be paid by said company; and any party aggrieved by the assessment of damages, may have the matter determined by a jury, provided an appeal be made to the said court within thirty days from the time of filing the report by the said commissioners, and said court shall thereupon order a trial by jury, to be conducted as any other case of similar trial; if the jury increase the damages, the same and all costs and charges shall be paid by the company, otherwise the costs and charges to be paid by the owner or party interested; and the judgment may be entered upon the verdict of said jury, and execution issued thereon, as in other cases, unless said company shall, within ten days after said verdict is rendered, elect to abandon their proposed route or appropriation of said road or highway, by an instrument in writing to that effect, to be filed with the clerk of the said court and entered on the minutes thereof; and as to so much as is thus abandoned, the assessment of damages shall be void; *provided*, that upon such abandonment, the costs of all proceedings to be taxed by the said court, shall be paid by the company to the opposite party; *and provided also*, that all the provisions of this section shall apply to any telegraph or telephone company specially incorporated.

3. *And be it enacted*, That this act shall take effect immediately.

Prescriptive Rights are regulated by an act, approved 21 April, 1884 (Laws, page 239; Supp. to Revision, 1877-1886, page 1023),—

1. *Be it enacted, &c.*, That whenever any wire or cable, used for any telegraph, telephone, electric light, or other wire or cable for electric purposes, is or shall be attached to, or does or shall extend upon or over any building or land, no lapse of time whatsoever, shall raise a presumption, or justify a prescription of any perpetual right to such attachment or extension.

JOHN B. UHLER

(To be continued.)

RECENT AMERICAN DECISIONS.

Supreme Court of California.

SESLER v. MONTGOMERY.

1. The speaking of slanderous words by a husband to his wife, is a publication of them.

2. A communication by a husband to his wife, in regard to a female friend of hers, accusing her of perjury and want of chastity, *heli*, not privileged where the husband and wife were on bad terms and the plaintiff had testified in her behalf in divorce proceedings between them.

3. Under a statute providing that evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict, comment to the jury upon the failure of defendant to introduce his wife to corroborate his own testimony, is proper.

Appeal from the Superior Court of Alameda county.

Action by Mary A. Sesler against A. Montgomery for slander. Judgment for plaintiff, and defendant appeals.

Estee, Wilson & McCutchen, J. C. Martin, and W. F. Goad, for appellant.

W. W. Allen, A. R. Cotton, and W. H. H. Hart, for respondent.

HAYNE, C. December 3, 1888. Action for slander. Verdict and judgment for plaintiff. Defendant appeals. Several points are made.

1. It is said that there was no publication. The facts are that the words were spoken to the defendant's wife, and were overheard by the plaintiff, who was listening in the corridor. The point is that husband and wife are in law one person, and that therefore a communication between them is not "published," within the meaning of the law of slander. It is to be observed that this is a different thing from saying that the communication was privileged. There must be a publication before the question of privilege can arise. We have not been referred by appellant to any decision in support of the precise point, except *Trumbull v. Gibbons* (1818), 3 City H. Rec. (N. Y.) 97, decided by an inferior court. We have not had access to this report, but from the mention of the case in Townshend

on Slander, we should infer that the decision proceeded on another ground, and that what is said in relation to the question in hand, is merely a *dictum*. Nor have we been able to find any case exactly in point. Upon principle, we should say that there was a publication. That husband and wife are one person, is a mere fiction, and is not true for all purposes. The tendency of modern law, especially in California, is certainly not to extend the operation of the fiction. Nor do we see any reason why it should be extended, at least in the present direction. The reputation of a woman can certainly be injured by slanderous communications to her female friends; and the fact that the communication came through a husband, would not ordinarily deprive it of its injurious effect. Furthermore, if husband and wife are one person to the extent that a communication from the husband to the wife, concerning a third person is not published, it would seem to follow that a communication from a third person to one of the spouses concerning the other, would not be a communication concerning a third person, so as to constitute a slander. But the contrary has been decided. A communication to one of the spouses concerning the other may be slander: *Weinman v. Ash* (1853), 13 C. B. 836; *Schenck v. Schenck* (1843), 20 N. J. L. 208; Odgers on Lib. & Sland. *152, *153. That the result is the same in each case, is stated by Townshend, who says: "The husband or wife of the author or publisher, or the husband or wife of him, or whose affairs the slander concerns, is regarded as a third person:" Townshend on Lib. & Sland. § 95. We think, therefore, that a communication from a husband to his wife may constitute a publication.

2. It is contended that there was no evidence that the wife heard or understood the words uttered. The words imputed to the plaintiff perjury and a want of chastity, and hence were slanderous *per se*. They were not ambiguous, and were spoken of the plaintiff, and could not have referred to any other person. This being the case, the only possible point that can be made in this regard is that there is no proof that the wife heard or understood the words at all. It is certainly true that the slanderous words must be heard and understood. And it may be conceded that the burden is on the plaintiff to prove the

hearing and understanding. But where a man converses with his wife in a room in such a tone of voice that he can be heard and understood by a person outside of the room, it is hardly possible that the wife did not hear and understand him. If the wife was deaf, or did not understand the language, or any other peculiar circumstance existed to prevent what would be the ordinary result, we think the defendant should have proved it. What was proved was sufficient to overcome the burden we have assumed to be on the plaintiff in the first instance.

3. It is urged that the communication was privileged. The Code provides that a privileged communication is one made "in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." Civil Code, § 47. It is clear from the above that, if there be malice, the communication cannot be privileged, and the question of the existence of malice is one for the jury. In this case the jury was instructed that, if no malice was shown, the communication was privileged. It must be assumed from their verdict, therefore, that they believed that there was malice; and, although malice is not to be inferred from the mere fact of the publication (*Id.* § 48), we cannot say from the record that the jury was not justified in finding the existence of malice. The circumstances were such as to negative the theory that the communication was for justifiable purposes. At the time it was made, the defendant was on bad terms with his wife. A suit for the annulment of the marriage was then pending. The plaintiff was an acquaintance of the wife, and had come, at the wife's request, to give the protection of her presence against any outbreak on the part of the husband. She had testified on behalf of the wife in the suit above mentioned. The charge of perjury was probably made by the husband with reference to this testimony, and the inference is strong that it was resentment on his part at her testifying on the part of the wife, and not solicitude for the welfare of his family, that caused him to utter the slander. This inference is not weakened by the circumstance that the interview be-

tween the defendant and his wife was a stormy one; that he "became so excited" that he called his wife a liar; that the communication with reference to plaintiff was coarse and brutal in its nature; and that "he spoke in an angry tone." Taking everything together, we think there was evidence from which the jury could infer malice. Hence the communication was not privileged.

4. It is claimed that there was an irregularity of counsel for the plaintiff in the argument to the jury. During the trial the plaintiff called the defendant's wife to the stand, and after she had been sworn, and testified that she was his wife, the defendant's counsel objected to any further testimony from her, on the ground that the consent of the defendant to her being a witness had not been obtained. There was no ruling upon the point. The plaintiff withdrew the witness, and she was not subsequently recalled by either party. This left a direct conflict between the plaintiff and the defendant as to whether the slanderous words were uttered. The plaintiff affirmed the fact, and the defendant positively denied it. During the argument the plaintiff's counsel began by referring to the objection which had been made to the wife's testifying, and was proceeding to argue from it that an inference against the truth of the testimony of the defendant should be drawn. The counsel for the defendant objected to this line of argument; but the Court overruled the objection, and the counsel for the plaintiff proceeded with his argument, dwelling mainly upon the failure of the defendant to call his wife as a witness. We think the action of the Court was proper. Where it is in the power of a party to call a witness who can corroborate or disprove his statements, his failure to call such a witness is a legitimate subject of comment to the jury. Such a case falls within the scope of subdivision 6 of section 2061 of the Code of Civil Procedure, which provides that "evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other side to contradict." See, also, *Gray v. Burk* (1857), 19 Tex. 228. The non-production of evidence in such case is a circumstance from which the jury may draw an inference of fact. If this is so, it is permissible to counsel to ask

them to draw such inference; and it is a matter of every-day occurrence for counsel to make such arguments. The case is not similar to that of a person accused of crime; for the statute expressly provides, with reference to cases where the prisoner does not testify, that "his neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or other proceeding:" Pen. Code, §1323. Now, in the present case, the wife was perfectly competent to be a witness if the defendant had consented. The slanderous words having been alleged to have been spoken to her, she could have corroborated or disproved his statements; and the circumstances excluded any idea that the communication was in fact confidential. He exercised much ingenuity to avoid admitting that she was his wife. His failure to consent was the sole reason she could not testify; and under the circumstances we think that the case falls within the rule above stated, and that the failure to give his consent was a subject of comment to the jury. It is to be observed that there was no ruling of the Court upon the admissibility of the testimony, the witness having been withdrawn before a ruling was made; and there was no attempt to argue against the justice of the law, or to induce the jury to disregard the law, and it is therefore unnecessary to express an opinion as to what would have been the result, had such circumstance existed. Moreover, we are not to be understood as saying that in every case in which a party fails to produce a witness, such failure may be commented on to the jury. The fact sought to be inferred may not be an issue in the case, (*Fletcher v. State* (1874), 49 Ind. 124), or may not be proper for the consideration of the jury: *Rudolph v. Landwerlen* (1883), 92 Id. 34. The whole subject of the latitude to be allowed counsel in argument, rests very much in the discretion of the trial court, and an exercise of such discretion should not be disturbed, except in a clear case. The other points do not require special notice. We do not see any contradiction in the instructions. The charge of the Court seems to have correctly presented the case to the jury. We think that the defendant had a fair trial, and we therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFARLAND, J., (concurring.) I concur in the judgment; but I am not prepared to say that there would have been a publication, if, at the time the slanderous words were spoken by defendant to his wife, he had been living with her in the friendly and confidential relation which usually exists between husband and wife.

Except in an early case in New York, in a city court, where it was said that the delivery of a libel by the author to his wife is privileged, (*Trumbull v. Gibbons* (1818), 3 City H. Rec. (N. Y.) 97), the main question in the principal case has not heretofore arisen in our courts. Mr. Odgers states that it has never arisen in England, "probably because in every such case there has been an immediate and undoubted publication of the same slander or an exaggerated version thereof by the wife to some third person, for which the husband would be equally answerable in damages and which would be easier to prove;" adding that, in his opinion, such a communication would enjoy the same privilege as that which is supposed to attach to matters divulged by a Roman Catholic to his priest, under the seal of confession: *Odgers on Libel and Slander*, 153. But the Supreme Court of California, in the principal case, takes a different view; S. C., 28 AMERICAN LAW REGISTER, 125; and this opinion is somewhat strengthened by a decision of the Supreme Court of North Carolina, in a case decided in the same month.

This was a prosecution for criminal slander under the North Carolina code, for charging a woman with incontinency. The words were spoken to the prosecuting witness, the defendant's wife being a short distance away. On the trial, the defendant's counsel asked for an acquittal, on the ground that the

"legal entity" of the wife being merged, "husband and wife are one person," and, therefore, words spoken by the husband in the presence of the wife are protected; and "assuming that the supposed defamatory words were spoken in the hearing of a third person," the wife is not such a person, within the meaning of the law; and if she were such a third person, the fact that she was "a short distance off," is not sufficient to prove that she heard the defamatory words. The Court overruled the objection; and, on appeal, its ruling was sustained, DAVIS, J., saying: "We are unable to see the force of this objection. The words spoken were not of a gentle and confidential character between husband and wife, but spoken in a loud tone, which could have been heard a long way off; and, besides, it appears from the testimony in behalf of the defendant, that a negro woman was near, and that the witness, John Lytle, was in hearing, though he testified that the language used by the defendant was different from that charged by the prosecutrix:" *State v. Shoemaker* S. Ct. N. C., Dec. 18, 1888. 28 AMERICAN LAW REGISTER, 190.

Defamatory words are not actionable until they are published, and by publication is meant the putting of the slander before one or more persons other than the plaintiff. To slander a person to his face, is not actionable, unless some one overhears it; nor is it, to send an enclosed letter, containing de-

defamatory matter, to the plaintiff: *Cooley on Torts*, 193; *Lyle v. Clason* (1804), 1 Cal. (N. Y.) 581; *Spaite v. Poundstone* (1882), 87 Ind. 522; *McIntosh v. Matherly* (1848), 9 B. Mon. (Ky.) 119; *Broderick v. James* (1871), 3 Daly (N. Y.) 481; *Desmond v. Brown* (1871), 33 Iowa, 13. *Aliter*, where one is prosecuted criminally and not sued: *State v. Avery* (1828), 7 Conn. 266. A proprietor of a newspaper cannot be found to have published a libel, unless it is proved to have been read, as well as printed and sold: *Prescott v. Tousey* (1884), 50 N. Y. Super. Ct. 12.

But to constitute a publication the libel need not be made known to the public generally; it is sufficient if it be made known to a single third person: *Adams v. Lawson* (1867), 17 Grat. (Va.) 250.

To shout defamatory words where no one can hear them, is not a publication of them; but if any one is within hearing, it is no defence that the defendant did not intend them to be heard by the person: *Shepherd v. Whitaker* (1875), L. R. 10 C. P. 502. Nor is it a publication to speak them to the person defamed, even though the place is a public one, if no other person hears them: *Sheffill v. VanDeusen* (1859), 13 Gray (Mass.) 304. It is no publication of a slander to speak it in a foreign language, which no one present understands: *Keene v. Ruff* (1855), 1 Iowa 482. To prove the publication of a libel written in German, it must be shown that it was read by some one other than the plaintiff who understood German: *Mielenz v. Quasdorf* (1886), 68 Iowa 726; *K. v. H.* (1866), 20 Wis. 239. But this does not apply to a libel printed in a foreign language: *Palmer v. Harris* (1869), 60 Pa. 156.

The publication must be made by the defendant. If the party to whom the slanderous words are spoken, or the

written libel is sent, being the one defamed, gives it to the world, the defendant is not responsible: *Fonville v. M'Nease* (1838), Dudl. (S. C.) 303. But the words are actionable, although spoken when no one else is present, to one who knows them to be false and who does not repeat them until after action is brought: *Marble v. Chapin* (1882), 132 Mass. 225. And an injunction of secrecy by the defendant to witness, is no defence: *McGowan v. Manissee* (1828), 7 T. B. Mon. (Ky.) 314.

To have a libelous writing in one's possession is no publication: *Odgers*, *152; neither is it to post up a libelous placard, if it is taken down before any one sees it: *Odgers*, *153. A defamatory writing is no libel, so long as it remains in the possession of the composer and is seen by no one else; but if he keeps such a paper in his possession, he must at his peril see that it does not fall into the hands of others; if it does, the publication is in law attributable to him as the party who originated the wrong and was the means of its becoming injurious: *Cooley on Torts*, 281. But Mr. *Odgers* says (page 152): "If I compose or copy a libel and keep the manuscript in my study, intending to show it to no one, and it is stolen by a burglar and published by him, it is submitted that there is no publication by me, either in civil or criminal proceedings. But it would be a publication by me, if through any default of mine it got abroad, whether through my negligence or folly," citing *Weir v. Hass* (1844), 6 Ala. 881, which seems to hold that a publication without the author's consent, is no publication as to him.

It is a publication to deliver it to a person who would necessarily read it, even though it is not proved that in the particular case, he did read it; as delivering a newspaper to a revenue commissioner to stamp it: *R. v. Amphlet*

(1825), 4 B. & C. 35; or a manuscript to a printer: *Baldwin v. Elphinstone* (1775), 2 W. Bl. 1037; *Trumbull v. Gibbons* (1818), 3 City H. Rec. (N. Y.) 97; or to send a libel by telegraph: *Whitfield v. R. Co.* (1858), E. B. & E. 115; *Williamson v. Freer* (1874), L. R. 9 C. P. 393; or by postal card: *Robinson v. Jones* (1879), 4 L. R. Ir. 391. Where A., by mistake, directed and posted a libel on B. to B's employer, instead of to B., this was held a publication: *Fox v. Broderick* (1864), 14 Ir. C. L. 453. So where A. wrote a libelous letter to B., but showed it to C. before posting it: *Snyder v. Andrews* (1849), 6 Barb. (N. Y.) 43; *M'Combs v. Tuttle* (1840), 5 Blackf. (Ind.) 431. So, where the defendant knew that the plaintiff's letters were always opened by his clerk in the morning and sent a libelous letter addressed to the plaintiff, which was opened and read by the plaintiff's clerk, lawfully and in the usual course of business, this was held a publication by the defendant to the plaintiff's clerk: *Delacroix v. Thevenot* (1817), 2 Stark. 56. So, where the defendant, before posting the letter to the plaintiff, had it copied, this was held a publication to his own clerk who copied it: *Keene v. Ruff* (1855), 1 Iowa 482. Where, however, though a third person may have had an opportunity of reading the libel, if he actually did not, it is no publication: *Odgers*, *153. It is no publication by one who picks up and delivers a sealed letter, the contents of which are unknown to him: *Fonville v. M'Nease* (1838), Dudl. (S. C.) 303. So, where a person wrote a letter and gave it to another to deliver folded, but not sealed, and the messenger delivered it to the plaintiff without reading it, it was held no publication: *Chutterbuck v. Chaffers* (1816), 1 Stark. 382; *Day v. Bream* (1837), 2 Moo. & R. 54. A communication of a slander on a man to his

wife, is a publication: *Wenman v. Ash* (1853), 13 C. B. 836; or to any member of his family: *Miller v. Johnson* (1875), 79 Ill. 58. It is a publication to give it to the agent of the plaintiff: *Brunswick v. Harmer* (1849), 14 Q. B. 185. As soon as the manuscript of a libel has passed out of the defendant's possession and control, it is published as to him. Thus a letter is published as soon as posted, and in the place where it is posted, if it is ever opened anywhere, by any third person: *Ward v. Smith* (1814), 6 Binn. (Pa.) 749; *Clegg v. Laffer* (1833), 3 Moo. & Sc. 727; *Warren v. Warren* (1834), 1 C. M. & R. 250; *Skipley v. Todd-hunter* (1836), 7 C. & P. 680.

The publication of a libel is sufficiently proved when it appears that a letter in the handwriting of the defendant, containing the libel, was found in the house of a neighbor of the person libeled, and by such neighbor and a third person opened and read: *Swinbelle v. State* (1831), 2 Yerg. (Tenn.) 581; A letter stating that the writer had heard of a slanderous report, is admissible in evidence to prove the circulation of the report, and may be read for that purpose, the handwriting of the person being proved; but it is not admissible to prove that the defendant had propagated the report: *Schwartz v. Thomas* (1795), 2 Wash. (Va.) 167. Evidence that a newspaper came from the defendant's office and was one copy of an edition of the same date, is proof of publication: *State v. Jeandell* (1854), 5 Harr. (Del.) 475.

Distributing newspapers containing libelous matter and receiving money for them by an agent, is sufficient evidence of publication: *Republica v. Davis* (1801), 3 Yeates (Pa.) 128. Where a witness swore that he was a printer, and had been in the office of the defendant where a certain paper was printed, and saw it printed there,

and the paper produced by the plaintiff was, he believed, printed with the types used in the defendant's office, it was held *prima facie* evidence of the publication by the defendant: *Southwick v. Stevens* (1813), 10 Johns. (N. Y.) 443. So, where the libel was published in a newspaper printed in another State, but which usually circulated in a particular county in Massachusetts, and the number containing the libel was actually received and circulated in the given county, this was held conclusive evidence of a publication within the county: *Commonwealth v. Blanding* (1825), 3 Pick. (Mass.) 304.

The entry of the resolution of excommunication from membership in a church on the minute book of the session, and the exhibition of it to the members for their signatures, does not constitute a publication: *Landis v. Campbell* (1883), 79 Mo. 433. Where, pending prosecution of a criminal charge against A., defendant wrote to A.'s father, stating that he was reliably informed that the prosecuting attorney had been bribed to release A. on consideration of the father employing him on a contingent fee in a suit against defendant, this was held a sufficient publication: *Young v. Clegg* (1883), 93 Ind. 371.

Where the only publication is one brought about by the plaintiff's own act, it has been held that this is not sufficient to give the right of action; on the principle of the maxim, *volenti non fit injuria*. Damages cannot be recovered for the repetition of slanderous words spoken by another, whether true or false, when such words were repeated by the defendant, at the request of the plaintiff: *Haynes v. Leland* (1848), 29 Me. 233; *Sutton v. Smith* (1850), 13 Mo. 120; *King v. Waring* (1808), 5 Esp. 13; *Smith v. Wood* (1812), 3 Camp. 323; *Warr v. Jolly* (1834), 6 C. & P. 497; *Weatherston v. Hawkins*

(1786), 1 T. R. 110; *Hopwood v. Thom* (1849), 8 C. B. 291; *Fonville v. M'Nease* (1838), Dudl. (S. C.) 303; *Nott v. Stoddard* (1865), 38 Vt. 25; *Heller v. Howard* (1882), 11 Bradw. (Ill.) 554. *Contra*, *Duke of Brunswick v. Harmer* (1849), 14 Q. B. 185; which holds that where the words have been previously uttered, suit may be brought on a repetition sought by plaintiff. And in *Griffiths v. Lewis* (1845), 7 Q. B. 60, Lord DENMAN, C. J., said: "Injurious words having been uttered by the defendant respecting the plaintiff, the plaintiff was bound to make inquiry on the subject. When she did so, instead of any satisfaction from the defendant, she gets only a repetition of the slander. The real question comes to this, does the utterance of slander once, give the privilege to the slanderer to utter it again, whenever he is asked for an explanation? It is the constant course when a person hears that he has been calumniated, to go with a witness to the party who he is informed has uttered the injurious words and say, "Do you mean, in the presence of witnesses, to persist in the charge you have made?" And it is never wise to bring an action for slander, unless some such course has been taken. But it never has been supposed that the persisting and repeating the calumny in answer to such a question, which is an aggravation of the slander, can be a privileged communication; and in none of the cases cited has it ever been so decided." Where, within six months before suit brought, the defendant said concerning the words alleged to be actionable, but which were barred by the statute, "I never denied what I have said and I will stand up to it," this was held not a repetition of what he had previously said, and that an action could not be sustained thereon: *Fox v. Wilson* (1856), 3 Jones (N. C.) 485. So, where the plaintiff, after receiving a libelous letter from the defen-

dant, sent for a friend of his and also for the defendant, and then repeated the contents of the letter in their presence, and asked the defendant if he wrote that letter, the defendant, in the presence of the plaintiff's friend, admitted that he had written it, this was held no publication by the defendant to the plaintiff's friend: *Fonville v. M'Nease* (1838), Dudl. (S. C.) 303.

The testimony given by a witness on a trial, in which he acknowledged the uttering of certain words to be slanderous, cannot be proved as an admission, in a subsequent action for slander brought against him: *Osborn v. Forshee* (1871), 22 Mich. 209.

Proof that the words were spoken to plaintiff, or in his presence, need not be made; it suffices to show that they were spoken to a different person: *Ware v. Cartledge* (1854), 24 Ala. 622. Where a letter containing a libel is sent sealed, and the writer subsequently states in the presence of witnesses that he had got a certain person to write it for him, and that he had signed his name to it and kept a copy, and also states what the contents were, but does not produce the copy, this is a sufficient publication: *Adams v. Lawson* (1867), 17 Grat. (Va.) 250.

The moral or intellectual character of the person in whose hearing the slander is uttered, is irrelevant: *Sheffill v. Van Deusen* (1859), 13 Gray (Mass.) 304.

JOHN D. LAWSON.

San Francisco, Cal.

Communications to attorneys-at-law physicians and clergymen are often privileged, when made in the course of a specific retainer or confession: see Leading Article, January, 1889 (xxviii. A. L. R. 1), and State Statutes (Id. 16-21).

Communications to a prosecuting attorney by a person enquiring whether the facts communicated make out a case of larceny for a criminal prosecution, are absolutely privileged: *Vogel v. Grues*, 110 U. S. 311 (abstract of same case, xxiii. A. L. REG. 273).

So, communications to a body of citizens, respecting the character of a nominee for judicial office, are privileged, unless there is actual malice: *Briggs v. Garrett*, xxv. A. L. R. 493; *Spiering v. Andrae*, xviii. Id. 186; though, if false, and published in a newspaper, the editor cannot invoke the privilege: *Bronson v. Bruce*, xxv. Id. 509, and note.

Communications made during an interview, sought by the accused and his friend, with the defendant, are privileged: *Billings v. Fairbanks*, xxiii. A. L. REG. 549.

There is no privilege attached to slanderous words spoken privately to one who knows them to be false and does not repeat them until after the action is brought: *Marble v. Chopin*, xxii. A. L. REG. 78.

Privilege depends upon public policy: note to *Munster v. Lamb*, xxiii. A. L. REG. 19-25. J. B. U.

Supreme Court of Kansas.

SWITZER v. CITY OF WELLINGTON.

A city cannot be garnisheed and made liable to pay a creditor of its creditor, without express statutory provision.

This exemption is based entirely upon grounds of public policy, as otherwise the usefulness and power of municipal corporations, in the discharge of their functions, would be impaired, and the municipalities subjected to duties, liabilities and expenditures, merely to promote private interest and convenience.

The Kansas statutes relating to garnishments and cities of the second class, do not authorize the creditor of a municipality's creditor to attach moneys due and owing by the municipal corporation.

Error to the District Court of Sumner County.

Action against a city to recover a sum attached by garnishee process, under Section 54a, c. 81, Comp. Laws of 1879 (page 706 of Comp. Laws of 1885), which provides—

“That in all personal actions arising upon contract, before justices of the peace, if the plaintiff, his agent or attorney, shall file with the justice, at the time of or after the commencement of suit, an affidavit that he has good reason to believe, and does believe, that any corporation or person to be named, and within the county where the action is brought, has property, money, goods, chattels, credits, and effects in his hands, or under his contract [control], belonging to the defendant, or that such corporation or person is anywise indebted to the principal defendant (naming him), is justly indebted to the plaintiff in a given amount over and above all legal set-off, and that the plaintiff has good reason to, and does, believe that he will lose the same unless a garnishee summons issue to the aforesaid person, a garnishee summons shall be issued and personally served, in the same manner as an ordinary summons, and from the time of such service the garnishee shall stand liable to the plaintiff for all property, money, and articles in his hands, or due from him to the defendant.”

John M. Graham and Isaac G. Reed, for the plaintiff in error.

W. H. Stafflebach and Lawrence & Ferguson, for the defendant in error.

HOLT, C., November 10, 1888. On January 8, 1883, H. Switzer, the plaintiff in error, brought an action in a justice's court against James Cronin, and recovered judgment by confession on the 12th day of January. At the same time, he served a garnishee process upon P. A. Wood, mayor of the city of Wellington. Upon the 22d of January, the mayor answered under oath that the city was indebted to James

Cronin in the sum of \$45.88. The city failing to pay this amount, the plaintiff brought this action to recover it. Judgment was rendered for the defendant in the justice's court, and the case was taken to the Sumner district court on error, where the judgment was reversed, and the case held for trial in said court. Upon trial, judgment was again rendered for the defendant.

It appears that the city of Wellington was indebted to Cronin, on a contract for work upon the streets, but it was agreed in open court, that the only question sought to be presented here, should be whether or not a municipal corporation should be required to answer as a garnishee in a justice's court. The plaintiff contends that Section 54a, c. 81, Comp. Laws, 1879, authorizes such a proceeding. It is as follows: [as above.]

It is contended that the phrase "any corporation or person," includes a city of the second class; that the term "corporation" is used without limitation, and would embrace not only private, but public corporations. We think that the term "corporation," as used in this section, has reference solely to private corporations, organized for private purposes, and does not include municipal corporations. Cities are a part of the government, and should not be required to become involved in litigation in which they have no interest. This exemption from garnishee process is based entirely upon the ground of public policy. The reasons given by different courts are numerous; among others, that it would impair the usefulness and power of such corporations in the discharge of their functions. It would draw cities into litigation, and occupy the time of their officers in expensive and vexatious suits in which they had no interest, and would compel them to expend the money of the people and the time of their officials on a matter wholly foreign to their creation. It might impede public improvements, and the execution of contracts in which the public would be interested. In *Merwin v. City of Chicago* (1867), 45 Ill. 133, the Court says: "But, in our opinion, the city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all cases, and the exemption from liability be allowed to depend, in each case, upon the character of the

indebtedness, we shall leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation. A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury, in defending suits, in order that one private individual may the better collect a demand due from another. A private corporation must assume the same duties and liabilities as private individuals, since it is created for private purposes. But a municipal corporation is part of the government. Its powers are held as a trust for the common good. It should be permitted to act only with reference to that object, and should not be subjugated to duties, liabilities, or expenditures, merely to promote private interest or private convenience." *Wallace v. Lawyer* (1876), 54 Ind. 501; *McDougal v. Hennepin Co.* (1860), 4 Minn. 184; 1 Dillon on Mun. Corp., § 100; *State v. Eberly* (1882), 12 Neb. 616; *Hawthorn v. City of St. Louis* (1847), 11 Mo. 59; *Erie v. Knapp* (1857), 29 Pa. 173; *Mayor, etc., v. Rowland* (1855), 26 Ala. 498; *Mayor of Baltimore v. Root* (1855), 8 Md. 95; *Burnham v. City of Fond du Lac* (1862), 15 Wis. 193; *Buffham v. City of Racine* (1870), 26 Id. 449; *School-Dist. v. Gage* (1878), 39 Mich. 484; *McLellen v. Young* (1875), 54 Ga. 399; Drake on Attachm. § 516; 2 Wade on Attachm. §§ 345, 419; Waples on Attachm. & Garn. 236 *et seq.* See, also, *McCubbin v. Atchinson* (1873), 12 Kan. 166, and notes of reporter on pages 169-70. The authorities are not entirely uniform. *Contra*: *City of Newark v. Funk* (1864), 15 Ohio St. 462, in which the court held that a municipal corporation could be garnisheed. The statute of Ohio provides that any claims or choses in action, due or to become due to the judgment debtor, and all money, goods and effects, which he may have in the hands of any person, body politic or corporate, may be made subject to the payment of a judgment: Rev. Stat. Ohio, ed. 1884, § 5464. Also, *Wilson v. Lewis* (1872), 10 R. I. 285; *Bray v. Town of Wallingford* (1850), 20 Conn. 416; *Adams v. Tyler* (1876), 121 Mass. 380.

Plaintiff contends, if this were the ordinary and fair interpretation of section 54a, the defendant has waived it by the answer of the mayor to the garnishee process; and cites *Clapp v. Walker* (1868), 25 Iowa 315. That authority is not applicable in this case. That action was brought against a school district, and the district admitted an indebtedness for a part of the amount claimed, and denied its indebtedness for any greater sum. A trial was had, and verdict set aside; and, after the evidence was all introduced in the second trial, the Court was asked to instruct the jury that a municipal corporation could not be garnisheed, and therefore was not liable. In the [present] action of *Switzer v. Cronin*, the mayor, in response to garnishee summons, answered simply that the city was owing Cronin \$45.88. When this action was brought against the city, it denied its liability at once, and has contested this action, on the ground that, being a municipal corporation, it was not answerable to Switzer for any amount it might be owing Cronin. The plaintiff calls our attention to section 102, c. 18, Comp. Laws, relating to cities of the first class, which is: "Lands, houses, moneys, debts due the city, and property, and assets of every description belonging to any city under this act, shall be exempt from taxation, execution, and sale, and such cities shall not be required to answer as garnishee in any action." And also to section 104, c. 19, relating to cities of the second class, as follows: "All lands, houses, moneys, debts due the city, and property and assets of every description, belonging to any city or municipal corporation, * * * shall be exempt from taxation." The plaintiff contends that because the clause, "and such cities shall not be required to answer as garnishee in any action," is omitted in section 104 of chapter 19, it was intended that cities of the second class should be required to answer as garnishee, and that under the ordinary rules of construction, cities of the first class only were intended to be exempt. We concede the force of this argument, but it does not necessarily follow, because it was inserted in the law governing cities of the first class, that the rule would have been otherwise if it had been left out. The acts relating to cities of the first and second class were enacted at different times; the one concerning cities of the second class in 1872,

and the other in 1881. We cannot say that the omission from the earlier act was intentional. We believe the rule to be, before a city is required to answer in garnishee proceedings, there must be an express provision of the statute compelling them to do so. This being the law, its omission would not justify the inference of plaintiff. The rule of construction contended for by plaintiff is not clearly applicable to the statutes cited and compared, and we think such construction should yield to the more important question of public policy; and that no city, without an express provision of the statute, should be drawn into litigation in which it has no interest, and wholly foreign to the purposes of its creation, and the money of the people expended, and the time of its officials devoted to matters of no public interest or benefit. We therefore recommend that the decision of the court below be affirmed.

Per Curiam. It is so ordered.

HORTON, C. J., and JOHNSTON, J., concur. VALENTINE, J., dissents.

Municipal corporations are, in many respects, part and parcel of the Government, and most attempts to garnishee them have been made for the purpose of reaching the salaries of the officials employed by them, in their governmental capacity. Now, it is settled that the salary of an officer of the United States cannot be attached: *Spalding v. Imlay* (1793), 1 Root (Conn.) 551; *Averill v. Tucker* (1824), 2 Cranch. (U. S. C. Ct.; D. C.) 544; *Buchanan v. Alexander* (1846), 4 How. (45 U. S.) 20. And there is the same unanimity with respect to the salaries of officers of particular States in the American Union: *Stillman v. Isham* (1835), 11 Conn. 124; *Wicks v. Branch Bank* (1847), 12 Ala. 594; *In re Meekin v. State* (1849), 9 Ark. 553; *Bank of Tennessee v. Dibrell* (1855), 3 Sneed (Tenn.) 379; *Dobbins v. Or. & Al. R. R. Co. & Super. of the W. & A. R. R. Co., Garnishee* (1867), 37 Ga. 240; *Bulkley v. Eckert* (1846), 3 Pa.

368; *Tracy v. Hornbuckle* (1871), 8 Bush (Ky.) 336.

Only two cases have been found, in which the salary of a county official was sought to be reached, and both arose in Massachusetts; in the first one, it was held not to be attachable: *Chealy v. Brewer* (1811), 7 Mass. 259; but a different view of the subject was taken in the same State sixty-five years later: *Adams v. Tyler* (1876), 121 Id. 380. With respect to the salaries of city officials, out of ten cases, seven hold that these may not be attached: *Bradley v. Richmond* (1834), 6 Vt. 121; *Hawthorn v. St. Louis* (1847), 11 Mo. 59; *Mayor &c., of Mobile v. Roland & Co.* (1855), 26 Ala. 498; *Mayor, &c., of Baltimore v. Root* (1855), 8 Md. 95; *Hoyt v. Experience* (1858), 26 Ga. 113; *Clark v. Lee's Assignee* (Ct. App. Ky., 1875), 12 Alb. L. J. 391; *Walker v. Cook* (1880), 129 Mass. 577; and three that they may be attached; *Speed v. Brown* (1849), 10 B. Mon. (Ky.) 108; *Smoot v. Hart*

(1858), 33 Ala. 69; *Wilson v. Lewis* (1872), 10 R. I. 285.

The case of *Hadley v. Peabody* (1859), 13 Gray (Mass.) 200, was an attempt to attach a teacher's salary, which was payable quarterly. The process was served in the middle of the quarter. The Court said, "The plaintiff contends that the city must be charged for the part of a quarter's salary, proportioned to that part of the time which had elapsed at the time since the beginning of the quarter. * * * It was not a debt, it might not become a debt; the contract was entire, and until completed on the part of the teacher, nothing was due. We think this point is settled by authorities." The intimation is plain here, that, if the salary of a whole quarter had been due, the attachment would have been sustained.

Speed v. Brown (1849), 10 B. Mon. (Ky.) 108, was an attempt to reach the salary due a city Marshal. A bill was filed for that purpose in equity. The Court said, "It seems to us that, as the city is a corporation which may be sued, a creditor unable by execution at law to coerce his debt, may subject to that debt the money actually due and owing from the city to the officer, for services, at the time of the commencement of the suit fully rendered, or where the money has been set apart for his use, and subject immediately to his demand." But it was held not to be practicable so to collect a future salary, because that might drive the debtor from the public service.

Seven cases have also been found in which it is not clear whether official salaries were involved or not; in four of them, *McWhidden v. Drake & Portsmouth* (1829), 5 N. H. 13; *Ward v. County of Hartford* (1838), 12 Conn. 404; *Bray v. Wallingford* (1850), 20 Id. 416; *Heebner v. Chace* (1847), 5 Pa. 115, the attachment was sustained. In three, *Eric v. Knapp* (1857), 29

Pa. 173; *McDougall v. Supervisors of Hennepin Co.* (1860), 4 Minn. 184; *Merwin v. Chicago* (1867), 45 Ill. 133, it was not. If we confine ourselves to those cases in which it is certain that municipal salaries were in question, we see that the decisions are more than two to one in favor of their exemption from garnishment.

As the law in question is judicial and not statutory, when it comes to be applied for the first time in any jurisdiction, the authorities are rightly to be considered, not with reference to their number alone, but also, and perhaps mainly, with reference to the strength and conclusiveness of their reasoning. And this reasoning may, for convenience, be considered under three heads, the first of which has been based on the assumption that, in the language of *Bradley v. Richmond* (1834), 6 Vt. 121, "the phraseology of the act implies personal privileges." Now, not only are "personal privileges" implied in attachment laws—as, indeed, in what law are they not, save in laws having reference solely to official status?—but, in most of them, the word "person" is actually applied to the garnishee. And the question, therefore, is, did the legislature intend to include a municipal corporation by that word? A strong side light is shed upon the question by cases in which ordinary corporations have sought to evade responsibility on the ground that they were not "persons," within other statutes than those of attachment.

Blackstone's definition of "person" appears to have been framed expressly for the purpose of including corporations. He says: "Persons are divided by law into either natural persons, or artificial; natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called cor-

porations or bodies politic:" 1 Bl. Comm. 123.

So, an American Judge has said that it does "not require the aid of the legislature to prove that the word *person* in a statute may extend to a corporation as well as to a natural person. That a State is a corporation cannot be doubted. It is a legal being, capable of transacting some kinds of business, like a natural person, and such a being is a corporation:" *State of Indiana v. Woram* (1843), 6 Hill (N. Y.) 33, and again: "The word person, in its legal sense, is a generic term and was intended to include artificial as well as natural persons;" *Douglas v. Pac. M. St.* (1854), 4 Cal. 304. Yet, notwithstanding the self-evident accuracy of these propositions, the ingenuity of corporation counsel has been exhausted in the repeated efforts to save their clients from the operation of statutes, which, in terms, applied to "any person." Thus, it had to be expressly decided, that a railroad company was a "person" within the Statute of Limitations: *Olcott v. Tioga R. R.* (1859), 20 N. Y. 210; *Thompson v. Tioga R. R.* (1861), 36 Barb. (N. Y.) 79; and could appeal as a "person" owning land: *People v. May* (1858), 27 Barb. (N. Y.) 238; and might, as a "person," be sued in the county where a trespass was committed: *Bartee v. Houston, &c., R.R.* (1871-2), 36 Tex. 648; and was a "person" within a statute relating to taxation: *Louisville & Nashville R. R. v. Commonwealth* (1866), 1 Bush (Ky.), 250, and this was afterwards extended to municipal corporations: *Wallace v. Mayor, &c., of New York* (1859), 2 Hill. (N. Y.) 440; and it was held that the bonds of a life insurance company were "personal estate," within the meaning of such a statute: *Brit. Com. Life Ins. Co. v. Com. of Taxes* (1865), 31 N. Y. 32; s. c. (1864), 18 Abb. Prac. 118, and (1864), 1 Abb. App.

Dec. 199; and that a bank was within such a statute, where the word used was "inhabitants:" *Ontario Bank v. Bunnell* (1833), 10 Wend. (N. Y.) 186; and so with a manufacturing company, where the words were "persons or associations:" *Parker Mills v. Com. of Taxes* (1861), 23 N. Y. 242; and it was also held that such a company might, as a "person," give its promissory note, and was within the Statutes of 3 & 4 Anne: *Mott v. Hick*, (1823), 1 Cow. (N. Y.) 513. See, also, *State of Indiana v. Woram* (1843), 6 Hill (N. Y.) 33, and within the protection given to "persons" by the Act of Congress of April 20, 1871: *N. W. Fertilizing Co. v. Hyde Park* (1873), 3 Biss. (U. S. C. Ct., N. D. Ill.) 480-2; and that a bank was a "person," within a statute against usury: *Thornton Bank of Washington* (1830), 3 Pet. (28 U. S.) 36. See, also, *Com. Bk. of Manchester v. Nolan* (1843), 7 How. (Miss.) 508; *Grand Gulf Bank v. Archer* (1847), 8 S. & M. (Miss.) 151; and that a steamboat company was a "person" within an Act for the commencement of process: *Douglas v. Pac. M. St.* (1854), 4 Cal. 304, and was a carrier, responsible as a "person" for injury: *Chase v. Amer. Steamboat Co.* (1871), 10 R. I. 79; and that one telegraph company could, as a "person," sue another for failure to send a message: *U. S. Tel. Co. v. W. U. Tel. Co.* (1865), 56 Barb. (N. Y.) 46-54. And that a fire insurance company was restrained, as a "person," from unlawfully exercising a franchise: *People v. Utica Ins. Co.* (1818), 15 Johns. (N. Y.) 358 (marg.); and was a "living person" within a statute allowing the examination of parties as witnesses: *La Farge v. Exchange Fire Ins. Co.* (1860), 22 N. Y. 352; and a railroad company was the same: *Field v. N. Y. Cen. R. R.* (1859), 29 Barb. (N. Y.) 176. And that a newspaper publishing company was a

"person" within the meaning of the U. S. Bankruptcy Laws: *In re Oregon Bulletin Co.* (1875), (U. S. D. Ct., D. Or.) 13 Nat. Bank. Reg. 199; and that a church was a "person" which could recover under a statute, for property injured in a riot: *St. Michael's Church v. County* (1847), Bright. (Pa.) 121. And that a university was a "person" which could enter land under a statute: *State v. Nashville Univ.* (1843), 4 Humph. (Tenn.) 157.

So much for "miscellaneous" cases. In at least two instances, it has been held that an ordinary "business" corporation is not a "person" within the meaning of the attachment laws. The first is that of the *President, &c., of Union Turnpike Road v. Jenkins* (1806), 2 Mass. 37, which was an attempt to attach money in the hands of "The New England Marine Insurance Co." The Court held that "an aggregate corporation cannot be summoned as trustee," for which opinion it gave no reason. In 1832, corporations were made liable to process of foreign attachments in Massachusetts, and the Public Statutes provide that "All personal actions, except actions of replevin and actions of tort for malicious prosecution, for slander, either by writing or speaking, and for assault and battery, may be commenced by trustee process, and any person or corporation may be summoned as trustee of the defendant therein; but a person who is not a resident of the commonwealth, or a corporation which is not established under its laws, shall not be so summoned, unless he or it has a usual place of business in the commonwealth" (ed. 1882, chap. 183, § 1, page 1052).

McQueen v. Middletown Mfg. Co. (1819), 16 Johns. (N. Y.) 5 (marg.) was an attempt to attach property of a foreign corporation. The law applied to the "estate of every debtor, residing out of the State." The Court said: "It is very

certain that no attachment can be issued under this act against domestic corporations, for they cannot conceal themselves nor abscond. The Court have no doubt, from a view of the whole act, that the Legislature intended to authorize proceedings under it against natural persons only. The twenty-first section supposes that the person giving the security to appear and plead to any action to be brought, would, if within the State, be subject to a suit; and we think a foreign corporation never could be sued here. The process against a corporation must be served on its head, or principal officer, within the jurisdiction of the sovereignty where this artificial body exists. If the president of a bank of another State were to come within this State, he would not represent the corporation here; his functions and his character would not accompany him, when he moved beyond the jurisdiction of the government under whose laws he derived this character; and though, possibly, it would be competent for a foreign corporation to constitute an attorney to appear and plead to an action instituted in another jurisdiction, we are clearly of the opinion that the legislature contemplated the case of a liability to arrest, but for the circumstance that the debtor was without the jurisdiction of the process of the courts of this State; and that the act, in all its provisions, meant that attachments should go against natural, not artificial, or mere legal entities. The first section speaks of persons, and throughout the act, natural persons only were intended to be subjected to its provisions. It is true that there are cases in which corporate property has been held liable to be taxed under acts which subject the property of *inhabitants* to taxation; but in all such cases, the tax operated *in rem*, on the estate; and it has been held, that whoever resided on the property represented in that respect the corpora-

tion, and, in the view of the act, were inhabitants; but it would not be correct to say abstractly, that the corporation, or mere legal entity, was an inhabitant. The statute under consideration being an innovation on the common law, it ought not to be carried further, by construction, than the plain and manifest intention of the Legislature indicates." Of this, it was said in *S. C. R. R. Co. v. McDonald* (1818), 5 Ga. 531, "The reasoning of the Court in that case is not very satisfactory. And, moreover, the provisions of the Statute of New York, upon which that decision was made, are somewhat different from those of our own act." And the weight of authority is decidedly opposed to this view. Thus, in *People v. Briggs* (1872), 50 N. Y. 553, it was said that the word "person," in the attachment law, included corporations, and the same was held in *Libbey v. Hodgdon* (1838), 9 N. H. 394. In *Planters' & Merchants' Bank v. Andrews* (1839), 8 Por. (Ala.) 404, the Court said: "The argument that *natural persons* are alone entitled or liable to the process of attachment, cannot be maintained. It is true that the statute would seem to refer to such persons only, yet it is well settled that the term "person," in a statute, embraces not only *natural*, but *artificial persons*; unless its language indicates that it was employed in a more limited sense, or the subject matter of the act leads to a different conclusion. In *S. C. R. R. Co. v. McDonald* (1848), 5 Ga. 531, it was held in an elaborate opinion, that a foreign corporation was a "person" within the meaning of the attachment laws. The Court said: "Corporations are to be deemed and considered as persons, when the circumstances in which they are placed are identical with those of natural persons expressly included in the statutes." And again, "Foreign corporations are, equally with natural persons, entitled to the remedy by at-

tachment in our courts—the right and the liability ought to be reciprocal," and the Court called attention to a case already cited (*Benster, Garnishee v. Farmers' Bank* (1838), 12 Pet. (37 U. S.) 102; see opinion on page 134, n.), wherein it was held that a corporation was a "person" within the meaning of the provisions of a Federal statute giving a preference to the United States in the distribution of the effects of revenue officers, "or other persons hereafter becoming indebted to the United States:" *Balto. & Ohio R. R. Co. v. Gallahue's Ad.* (1855), 12 Grat. (Va.) 655. The Court said: "The only particular in which there is any departure from a literal compliance with the statute, is in regard to that provision of the seventeenth section which declares that when any garnishee shall appear, he shall be examined on oath. This clause was for the benefit of the plaintiff in the attachment. In the case of a corporation, he must receive an answer in the only mode by which a corporation can answer, under its corporate seal. In chancery, where, as a general rule, all answers must be verified by oath or affirmation, a corporation must answer in the same way, though, where a discovery is wanted, a practice has prevailed of making some of the officers defendants. The same result could be arrived at under the attachment law, by examining the officers as witnesses, if the plaintiff suggests that a full disclosure has not been made. This is an inconvenience to which he is subjected, growing out of the character of the garnishee, but furnishes no reason for exempting the corporation from being so proceeded against when all the other words in the statutes are sufficiently comprehensive to embrace artificial as well as natural persons. The mischief intended to be remedied applies as well to debts due by them as by individuals; and the circumstances in which they

are placed are the same as those of others embraced in the statute."

Finally, may be mentioned the case of the *Mineral Point R. R. v. Keep* (1859), 22 Ill. 9. This was an attempt to attach the property of a non-resident corporation. The Court called attention to the statutory provision that "the word 'person' shall be deemed to extend to and include bodies corporate, as well as individuals." The reasoning of the cases involving the construction of other than attachment laws, is precisely similar to that of those just cited; and the result of them all is, that a corporation is to be regarded as a "person" within the meaning of a statute, wherever it is possible so to regard it without implying an absurdity or an impossibility. If this appear too strong a statement, at least it cannot be denied that a corporation is *prima facie* a person, within the statutory meaning of that term, and that the burden is on him who seeks to exempt it from the operation of any act which applies to "persons," generally. And this observation holds with respect to the municipal corporation, as well as to other species of its *genus*. When, therefore, an act provides that any "person" may be garnisheed, to establish an exception in favor of a municipal corporation, on the ground that this word does not apply to such a body, it is necessary to adduce some conclusive reason why it cannot, in the nature of things, be so applied. Of course, if something were required of the "person" in any part of the act which a municipal corporation could not, from its peculiar constitution, perform, this requirement would be all sufficient. Only one attempt has been made to establish the exemption on this ground with any degree of detail. This was in the case of *Mayor, &c., of Mobile v. Roland & Co.* (1855), 26 Ala. 498, which was an attempt to attach the salary of a police officer, which was not due till towards the end of the month.

One section of the Code said that any "person" might be garnisheed, and another that "person" where used should include a corporation. The Court said, first, "This must be understood only of such provisions as will allow this signification to be given without violating their evident sense and meaning." And because it was provided in the attachment law that the garnishee must appear and answer upon oath, and might be orally examined, etc., it said, "these, and similar provisions which might be mentioned, clearly show that the statutes of garnishment cannot be applied to corporations, which from their impersonal, artificial character cannot be sworn; and cannot from the nature of things personally appear in court." Now, it would seem as if these objections were sufficiently met by the simple statement of the fact that, in equitable or in any other proceedings in our courts, municipal corporations do actually appear and are examined through their officers, without difficulty and without embarrassment. And it is evident moreover, that it applies to any corporation, ordinary as well as municipal, and would, if it were sound, exempt from almost every legal and equitable liability all the vast business corporations of the country.

So similar in language are the attachment statutes of the various States that this case may be said to exhaust the argument which might be derived from the provisions of any of them against including municipal corporations among the "persons" to which such statutes allude. In not one of them is any procedure demanded of the garnishee, which is not among the established and frequently exercised capacities of municipal, as of all other corporations. It follows that if the former are to be exempted from garnishment, it must be on other grounds than incapability.

J. T. RINGGOLD.

Baltimore, Md.

*Supreme Court of Vermont.*HOWARD *v.* WITTERS.

A chattel mortgage, properly executed to secure a *bona fide* debt, takes precedence of a previous real estate mortgage, in which personalty is also mentioned and attempted to be mortgaged, without complying with the statutory requisites.

Where the possession of personal property is given to the buyer, and no reservation of title is made, there is no valid vendor's lien.

Exceptions from Chittenden County Court.

Trover for taking live stock and farming tools. At the trial, September Term, 1887, the court directed a verdict for the defendant.

The Revised Laws of Vermont, chapter 99 (edition of 1880, page 405), provide—

SEC. 1965. All personal property shall be subject to mortgage, agreeably to the provisions of this act.

SEC. 1966. A mortgage of such personal property shall not be valid against any person except the mortgagor, his executors and administrators, unless the possession of the property is delivered to, and retained by, the mortgagee, or the mortgage is recorded in the office of the clerk of the town in which the mortgagor resides at the time of making the same, or if he resides out of the State, in the town in which the property is situated.

SEC. 1967. Each mortgagor and mortgagee shall make and subscribe an affidavit in substance as follows:

"We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the conditions thereof, and for no other purpose, and that the same is a just debt, due, and owing from the mortgagor to the mortgagee."

Which affidavit, with the certificate of the oath, signed by the authority administering the same, shall be appended to such mortgage, and recorded therewith.

SEC. 1970. Town clerks shall procure and keep a book of records for mortgages of personal property; they shall record therein any mortgage, transfer or discharge, and give a certified copy thereof when requested, on payment of their fees at the rate of ten cents a folio; shall certify the time when the same is received and recorded, and keep an alphabetical index of mortgagors and mortgagees, which record and index shall be open to public inspection.

SEC. 1972. A mortgagor of personal property shall not sell nor pledge such property mortgaged by him, without the consent of the mortgagee in writing upon the back of the mortgage and on the margin of the record thereof, in the office where such mortgage is recorded.

SEC. 1973. A mortgagor shall not execute a second or subsequent mortgage of personal property while the same is subject to a previously existing mortgage given

by such mortgagor, unless the fact of the existence of such previous mortgage is set forth in the subsequent mortgage.

And in relation to liens, chapter 100 provides—

SEC. 1992. No lien, reserved on personal property sold conditionally and passing into the hands of the conditional purchaser, shall be valid against attaching creditors, or subsequent purchasers without notice, unless the vendor of such property takes a written memorandum, signed by the purchaser, witnessing such lien, and the sum due thereon, and cause it to be recorded in the town clerk's office of the town where the purchaser of such property resides, if he resides in the State, otherwise in the town clerk's office of the town where the vendor resides, within thirty days after such property is delivered.

H. N. Deavitt and O. P. Ray, for plaintiff.

H. E. Powell, W. L. Burnap and C. W. Witters, for defendant.

POWERS, J. September 25, 1888. Lafave and wife conveyed a farm, together with the live stock and farming tools in question, to Chevalier, on the 20th day of May, 1882. This conveyance was by a warranty deed, and the personal property passed absolutely. To secure the purchase money, Chevalier, on the same day, executed an ordinary real estate mortgage to the plaintiff, to secure \$1,000 advanced by the plaintiff to Mrs. Lafave for Chevalier, and another mortgage to Mrs. Lafave, to secure the balance of the purchase money, and in both said mortgages, attempted to mortgage said personal property. In December, 1883, Chevalier, who had been in possession of the farm and personal property since May 20, 1882, executed to the defendant a chattel mortgage of the personal property purchased of Lafave, as above stated, to secure a loan then made to him by the defendant. Before taking the chattel mortgage, the defendants examined the records of personal mortgages and liens in the town clerk's office, and found no incumbrance upon the property, and had no actual notice of the contents of the plaintiff's deed.

The mortgage of the personal property by Chevalier to the plaintiff was valid between the parties as a common-law mortgage; but as to subsequent purchasers, it created no lien upon the property. It lacked the formalities requisite under our statute to constitute a valid chattel mortgage as against the defendant. It was not valid as a vendor's lien. The title did not pass from Lafave to Chevalier conditionally, but abso-

lutely. Lafave did not undertake to retain the title when he parted with the possession, but conveyed both to Chevalier, and undertook to make security by way of mortgage back from Chevalier. This cannot be done as against innocent purchasers under our statute relating to vendor's liens. The defendant's mortgage was properly executed to secure a *bona fide* debt, and it must take precedence of the plaintiff's improperly executed one. The plaintiff and defendant are two innocent parties suffering from the default of Chevalier, but the plaintiff and his assignor made possible the contingency that has happened. The defendant's note, secured by her chattel mortgage, had been lost at the time of the trial, but it appeared that the officer making the sale had it at the time of sale, and his computation of the indebtedness secured by the mortgage was based upon it. If Chevalier owed the debt secured by the mortgage, the defendant had the right, under the statute, to seize the property, and sell it. If the note then or since happened to be lost, the seizure is none the less legal.

The judgment is affirmed.

Upon no division of the vexed subject of the rights of vendors, on which are based his remedies against the goods themselves, in sales of personal property, has there been more controversy than in regard to the scope of the seller's lien. English courts, as well as American, have found the greatest difficulty in determining whether the right of the seller to withhold or countermand delivery, in cases of failure to pay the price agreed on, is a right of lien, in the strict sense; or a rescission of the contract; or a peculiar privilege which must be classed by itself.

In view of these differences of judicial opinion, the subject of the seller's lien presents elements of special interest to the profession, such as should render especially serviceable a consideration of this topic, based on all the authorities obtainable to date.

The general doctrine, authorizing the remedy, which, however familiar, must

be outlined in the first instance, is to the effect that a vendor of chattels has, until delivery, a lien upon them for the price: *Clark v. Draper* (1849), 19 N. H. 419, 421; *Parks v. Hall* (1824), 2 Pick. (Mass.) 206, 214. [This principle applies, however, only to absolute sales, and not to conditional ones, per WILDE, J., *Barrett v. Pritchard* (1824), 2 Pick. (Mass.) 512, 515; in the case of conditional sales, the title to the goods remains in the vendor and the question of lien does not arise: see *Haskins v. Warren* (1874), 115 Mass. 514, 533; note to *Rawson M'fg Co. v. Richards* (1887), 27 AMERICAN LAW REGISTER 591.]

[The application of the general right of lien upon undelivered personalty, is not prevented by taking a negotiable promissory note for the price, so long as the note remains in the hands of the vendor, ready for delivery to the vendee on the discharge of the lien: *Milliken*

v. *Warren* (1869), 57 Me. 46, 50; *Arnold v. Delano* (1849), 4 Cush. (Mass.) 33, 39. Delivery is the important feature, as it terminates the lien, though the purchase money is still unpaid and secured by a bond: *Beam v. Blanton* (1843), 3 Ired. Eq. (N. C.) 59, 62. "The law, in holding that a vendor who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt, or insolvent, and the vendor still retains the custody of the goods, or any part of them, or if the goods are in the hands of a carrier or middleman, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession by a stoppage *in transitu*; then his lien is restored and he may hold the goods as security for the price:" SHAW, C. J., *Arnold v. Delano, supra*; cited and followed by MILLER, J., *Thompson v. B. & O. R. R. Co.* (1867), 28 Md. 406. "Judges do not ordinarily distinguish between the retainer of goods by a vendor, and their stoppage *in transitu*, on account of the insolvency of the vendee; because these terms refer to the same right, only at different stages of perfection and execution of the contract of sale. If a vendor has a right to stop *in transitu*, *a fortiori* he has a right of retainer before any transit has commenced:" LOWRIE, C. J., *White v. Welsh* (1861), 38 Pa. 396, 420; *Griffiths v. Perry* (1859), 1 E. & E. (102 E. C. L.) 680; *M'Ewan v. Smith* (1849), 2 H. L. Cas. 309, 328; *Dodsley v. Varley* (1840), 12 A. & E. (40 E. C. L. 632.)

Where the goods are to be paid for on delivery, but the vendee refuses to pay for them on the completion of the delivery, the vendor has a lien for the price and may resume possession of the

goods: *Palmer v. Hand* (1816), 13 Johns. (N. Y.) 434. It is further held in this case, that if during the delivery, or before it is completed, the vendee sells or pledges the goods to a third person, for a valuable consideration, without notice to the original vendor, the lien of the latter will not be affected, but he may recover the goods from the subsequent purchaser or vendee. (See below.)

[The question of delivery being, therefore, vital, the following expressions from a case where stoppage *in transitu* was denied because of delivery on board the consignee's own ship was held to be the end of the *transitus*.

The goods had been sold on credit and the consignee became insolvent before the ship and cargo reached the consignees. Two judges dissented on the question of the *transitus* being complete; that is, in the application of the principles laid down by the majority of the court in these words:]

"Actual delivery, then, I understand, to consist in the giving real possession of the thing sold, to the vendee or his servants, or special agents, who are identified with him in law, and represent him. Constructive delivery is a general term, comprehending all those acts which, although not truly conferring a real possession of the thing sold, have been held, *constructione juris*, equivalent to acts of real delivery. In this sense, constructive delivery includes symbolical delivery, and all those *traditiones fictae*, which have been admitted into the law as sufficient to vest the absolute property in the vendee, and bar the rights of lien and stoppage *in transitu*; such as marking and setting apart the goods as belonging to the vendee, charging him with warehouse rent, &c.": ROGERS, J., *Bolin v. Huffnagle* (1828), 1 Rawle (Pa.) 19-20; Winfield's Adjudged Words, 17, 138.

[Where a quantity of pig iron was

piled at the furnace and was pointed out by the seller to the agent of the buyer, for the purpose of constructive delivery, and, for the same purpose, was charged on the seller's books to the buyer, but no actual delivery was made, the seller does not loose his lien, and the buyer becoming insolvent, could direct its shipment to other persons, for the seller's own benefit: *Thompson v. B. & O. R.R. Co.* (1867), 28 Md. 396, 407. MILLER, J., in delivering the opinion of the court, said: "The law applicable to such a case as this prayer," for instructions to the jury, "presents, is very clearly and accurately stated by SHAW, C. J., in the case of *Arnold v. Delano* (1849), 4 Cush. (Mass.) 33, 38, 39. There is, says he, manifestly a marked distinction between those acts, which, as between vendor and vendee, upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that actual delivery by the vendor to the vendee, which puts an end to the right of the vendor to hold the goods as security for the price:" *Id.* 406. This is contrary to *Parks v. Hall* (1824), 2 Pick. (Mass.) 206, 212, where it was held to be generally immaterial whether the delivery be actual or constructive, and a constructive delivery, according to the contract of sale, was held to be sufficient to defeat the lien.]

Hence, in regard to the effect of constructive delivery upon the seller's lien, there is a diversity of statement, and even an apparent conflict of opinion. This is not to be wondered at when due note is taken of the different senses in which the term "delivery" is used in the law of sales, and of the uncertain scope of the distinction between actual and constructive delivery.

["The term *delivery* is used in the law of sales in very different senses. It is used, in turn, to denote transfer of title and transfer of possession; and

where the parties have agreed, and the specific articles are appropriated and accepted, then, independently of the statute of frauds, it is often said, there is sufficient delivery to pass the title, although there be no transfer of possession. And this must be so, in order to be consistent with the lien, which remains to the vendor, for the price:" COLT, J., *Morse v. Sherman* (1871), 106 Mass. 430, 433, and citations there. Upon this statement of the law, an action for goods bargained and sold was sustained by evidence of a sale, "buyer's option, sixty days," at the Boston Mining and Stock Exchange, of shares of stock then in the possession of the seller and afterwards deposited with a trust company in part payment of the price. "The specific shares were appropriated to the defendants, the price was ascertained, the defendants were entitled to obtain possession of them at any time, upon payment of the balance of the price; the receipt was merely in the nature of a vendor's lien for the price, and the whole transaction was assented to by the defendants; and we are of opinion that this amounted to a transfer of the title, subject simply to the right of the plaintiff to require the trust company to obtain the price before surrendering the possession of the certificates:" C. ALLEN, J., *Frasier v. Simmons* (1885), 139 Mass. 531, 535, 536.]

That is, on the one hand, it is said that generally it is immaterial whether the delivery be actual or constructive: *Parks v. Hall* and *Arnold v. Delano*, *supra*; also, *Mason v. Hatton* (1877), 41 Up. Can. Q. B. 610. On the other hand, it has been declared that the lien of the seller always exists until he voluntarily and utterly resigns the possession of the goods sold, and all right to detain them; and that so long as the vendor does not surrender actual possession, his lien remains, although he may have performed acts which amount

to a constructive delivery, so as to pass the title or avoid the Statute of Frauds: *Thompson v. R. R. Co.*, *supra*. The latter statement seems more definite and accurate than the former. For the seller's lien includes the right to countermand documents of transfer, as will be presently seen, and this would hardly comport with the former statement of the law, as covering the broadest sense of the term *constructive delivery*; though it might not be requisite that there should be a delivery to the buyer personally, and a delivery to his servant or agent, sometimes called *constructive delivery*, might suffice.

Thus, a delivery to a common carrier, to be by him transported to the buyer, has been held a delivery to the buyer, such as passes the title and divests the seller of his lien, since the carrier is the agent of the buyer and receives the goods for him; *Boyd v. Mosely* (1853), 2 Swan. (Tenn.) 661, 663. But, of course, such a delivery would not deprive the seller of his right of *stoppage in transitu*.

Indeed, the rule is, that so long as the vendor has the actual possession of the goods, or as they are in the custody of his agents, and while they are in transit from him to the vendee, he has a right to refuse or countermand the final delivery, if the vendee be in failing circumstances: *White v. Welsh* (1861), 38 Pa. 396, 420; *Arnold v. Delano* (1849), 4 Cusb. (Mass.) 33, 39.

[Where notes are given, before maturity there is no lien; but after the notes have been dishonored, and the goods remain undelivered, the vendor's lien attaches without dissolving the original contract, and the vendees could not recover the value of the goods:] *Valpy v. Oakley* (1851), 16 Ad. & El. N. S. 941, 950.

Hence, this rule applies to a sale on credit, so as to allow a refusal to deliver possession if payment is not made when

the credit expires: *Hunter v. Talbot* (1844), 3 Smedes & M. (Miss.) 754, 761; nor is the rule changed by the fact that notes have been deposited as collateral security, if no money has been realized from them: *Id.*; and the rule even applies if a third person, upon whose credit the goods ordered were sold, becomes insolvent: *Wanamaker v. Yerkes* (1872), 70 Pa. 443, 445. Nor does it matter whether the sale is of specific chattels or an executory contract to supply goods: *Griffiths v. Perry* (1859), 1 El. & E. 600; or that the property is identified or designated: *Arnold v. Delano* (1849), 4 Cusb. (Mass.) 33; *Thompson v. Balt, Etc., R. R. Co.* (1867), 28 Md. 396.

[Where the contract was to supply bleaching power in monthly portions, and payment was to be received in cash, fourteen days after each delivery, the insolvency of the purchaser relieved the seller from delivering any more goods, until tender of arrearages and for goods to be presently delivered, and no damages would be allowed for such non-delivery:] *Ex parte Chalmers* (1873), L. R. 8 Ch. App. 289, 291.

Withholding delivery may be the remedy naturally available, where the seller retains the custody of the goods as bailee of the buyer, as under an arrangement to pay warehouse rent: *Grice v. Richardson* (1877), L. R. 3 App. Ca. 319.

In many cases the vendor may have given documents of transfer, and then the question arises, can he countermand them?

In England, the vendor may stop the delivery of the goods, under his lien for the price, even if he has given a delivery order for the goods, if such order has not been presented to the warehouseman, or other custodian of the goods, and recognized by him:

M'Ewan v. Smith (1849), 2 H. L. Ca. 309; *Griffiths v. Perry* (1859), 1 E. & E. 680; *Pooley v. Gt. West. Ry. Co.* (1876), 34 L. T. (N. S.) 537.

Like views are held in this country, and the seller's lien is held not to be divested by the endorsement and transfer of a delivery order for unpaid goods still in the possession of the seller's agent: *Southwestern, etc., Co. v. Standard* (1869), 44 Mo. 81; [and a sub-purchaser, even holding an order for delivery accepted by the seller, has no greater rights than the original purchaser:] *Southwestern, etc., Co. v. Plant* (1870), 45 id. 517. The same has been held of a warehouse order which was countermanded before it was presented to the warehouseman: *Keeler v. Goodwin* (1873), 111 Mass. 490, 491, 492; *Ware River R. R. Co. v. Vibbard* (1879), 114 id. 447, 454.

A tender of the price, even if not accepted, puts an end to the lien upon the goods sold: *Martindale v. Smith* (1841), 1 Q. B. 389, 395, 396. See also *Dempsey v. Carson* (Trin. Term, 25 Vic.) 11 Up. Can. C. P. 462, 466.

A partial payment is insufficient to extinguish the lien: *Minzesheimer v. Heine* (1855), 4 E. D. Smith (N. Y.) 65, 67; compare, however, *Merchants' Banking Co. v. Phenix B. S. Co.* (1877), L. R. 5 Ch. D. 205: s. c. 22 Eng. 33, 46, where JESSEL, M. R. said, "here it is a case of several payments for several portions of goods, and that, as regards these portions of the goods which have been actually paid for, there is no vendor's lien whatever."

Hence, a partial delivery does not prevent the seller's lien reviving upon the insolvency of the buyer, and attaching to the residue of the property remaining in the seller's custody; and even if the goods have been re-sold, the vendor's lien is in no way affected, unless the seller knew and approved such re-sale: *Hamberger v. Rodman* (1880),

9 Daly (N. Y. C. P) 93, 99, per DALY, C. J., citing many authorities.

[Where the purchasers agreed to execute a chattel mortgage, to secure the price of certain hotel carpets, and delivery was made under this agreement, before the execution of the chattel mortgage, the agreement for such mortgage could be enforced in equity and constituted an equitable lien against the purchasers and all claiming under them, except *bona fide* purchasers without notice: but the legal title had passed, and an action of trover against the receiver of the purchasers, for selling the carpets, could not be sustained: *Husted v. Ingraham* (1878), 75 N. Y. 251; *Hale v. Omaha Nat. Bank* (1876), 64 Id. 555. See also *Alexander v. Heriot* (1831), 1 Bail. Eq. (S. C.) 223, 225.

An agreement against a resale until payment of the price, does not give a lien: *Welsh v. Parish* (1833), 1 Hill (S. C.) 155, 163. "It is when put in the strongest point of view, only a condition subsequent, constituting a personal undertaking": per JOHNSON, J., Id. 163.

The superiority of vendors' lien on cotton, under the laws of Alabama and Louisiana, over the claims of parties intervening as pledgees, was in question in *Tyree v. Sands* (1872), 24 La. An. 363, 364. HOWE, J., said, the vendors "had their lien. They had a right to rely upon it, as upon any other legal protection. There can be no imprudent confidence in trusting one's property to the guardianship of the law. The intervenors, bankers of Mobile, knew the law, and were aware of the possibility of plaintiffs' lien. They might have easily asked if the cotton was paid for; they might have required their money to be used in payment for it:" Id. 366. The lien was sustained.

[Where a mule was purchased at public sale on a credit of nine months,

conditioned upon the purchaser giving approved security, which was not given, the vendor had a lien, which he was not bound to relinquish until the terms of sale had been complied with, and could therefore sue for the price, though the mule had not been delivered to the purchaser: *Wade v. Moffett* (1859), 21 Ill. 110].

In short, when goods are sold and there is no stipulation for credit, or time allowed for payment, the vendor has, by the common law, a lien for the price, so that he is not bound to part with the possession of the goods, without being paid for them: *Arnold v. Delano* (1849), 4 Cush. (Mass.) 33. But there is no lien for the purchase money of goods, with the possession of which the vendor parts absolutely and unconditionally: *Blackshear v. Burke* (1883), 74 Ala. 239, 242. [And no equitable or implied lien, while the vendee retains possession]: *James v. Bird's Admr.* (1837), 8 Leigh (Va.) 510. [Therein personalty differs from real estate. "By the Roman law, the vendor could in such a case as this, resort to the property; and so, I think, he may by the civil code of France, notwithstanding article 1583. * * * All contracts of sale, although positive in their terms, according to these laws, have, it is said, this implied condition: *provided the price is paid.*" But "we were referred to no case, on the argument, and I think the search would be in vain to find one, wherein it has been decided in a court of law or equity in this country, or in England, that, after a sale of personal property and a fair and absolute delivery to the purchaser personally, the vendor can reclaim the property because the consideration has not been paid:" per MARCY, J.], *Lupin et al. Marie & Varet* (1830), 6 Wend. (N. Y.) 77, 82, 83. "The law is well settled, that, when one voluntarily delivers possession of property which is

pledged, or upon which a lien exists, without any restriction or qualification, and without insisting upon payment, it is a release or waiver of any security or lien he may have upon such property, for its price:" GARDNER, J., *Wilkie v. Day* (1886), 141 Mass. 68, 73, citing *Farlow v. Ellis* (1860), 15 Gray (Mass.) 229; *Scudder v. Bradbury* (1871), 106 Mass. 422; *Haskins v. Warren* (1874), 115 Id. 514; *Upton v. Sturbridge Mills* (1873), 111 Id. 446.

The right of lien depends upon the possession (cases, *supra*); and to maintain it, a vendor must have the actual or constructive possession of the goods: *Parks v. Hall* (1824), 2 Pick. (Mass.) 206, 212. "To tolerate a lien severed from the possession by any device whatever, would be pregnant with all the mischiefs of colorable ownership; GIBSON, C. J., *Jenkins v. Eichelberger* (1835), 4 Watts (Pa.) 123.

The principle that the surrender of the possession is the extinction of the lien, applies especially where the surrender is to a purchaser from the vendor, against whom the lien exists in favor of his factor:" *Gwyn v. Richmond, etc., Ry. Co.* (1881), 85 N. C. 429.

[The principle is equally applicable where the property is put in the possession of a brother of the vendor, who is the servant of the vendee. "The property was in the use, and under the complete control and direction of Fuller," the vendee, "and to try to escape the legal consequences of this condition, by showing that the property was in the possession of Fuller's hired servant, as agent or trustee, would be an attempt to evade the provisions of the Statute of Frauds:" HEYDENFELDT, J., *Helm v. Dumars* (1853), 3 Cal. 454, 457.]

[The lien also attaches where drillings are delivered from time to time, to be made into sacks, and the manufactured sacks are delivered back to the seller, to hold until payment is made for

the material. But there is no lien while the drillings are in the buyer's possession, for manufacture into sacks; and the buyer could have made a good title upon a re-sale: *H. Witt v. Flint* (1857), 7 Cal. 264.]

[Where, however, wool was sold at an agreed price by weight, and removed before payment to a warehouse, to be packed and weighed, and, by the usual course of dealing, the buyer would not remove the wool from the warehouse until payment, actual possession was held to have been given as soon as the wool "was weighed and packed; that it was thenceforward at his," the buyer's, "risk, and, if burnt, must have been paid for by him. Consistently with this, however, the plaintiff had, not what is commonly called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment. But this lien is consistent, as we have seen, with the possession having passed to the buyer, so that there may have been a delivery to, and actual receipt by him:" DENMAN, C. J.; and the seller was given judgment for the price of the goods notwithstanding the defence that the goods had never been delivered: *Dodsley v. Varley* (1840) 12 A. & E. 141.

Questions relating to express reser-

vations of the seller's lien; to the record and notice of such lien; to the effect of sub-sales, and to conduct, estopping the seller from asserting his rights, must be deferred for future discussion.

NATHAN NEWMARK.

San Francisco, Cal.

["The lien of the purchaser, for the price of goods sold, originated with the Roman Law, and afterwards became incorporated into the Common law. It is a right to retain goods sold, until the whole price is paid. A partial payment, therefore, will not operate to destroy the lien of the vendor upon all the goods, but only to diminish it in value; every single portion of the property sold, being covered by a lien for the smallest fraction of the price:" Story, Sales, § 282; *Ex parte Chalmers*, L. R. 8 Ch. App. 289.

["The lien at common law, of the vendor of personal property, to secure the payment of the purchase money, is lost by the voluntary and unconditional delivery to the purchaser; but this does not prevent the parties from contracting for a lien which, as between themselves, will be good after delivery:" WAITE, C. J., *Gregory v. Morris* (1877), 96 U. S. 619; abstract S. C. 17 AMER. LAW REG. 601.

[There are special provisions, recognizing and enforcing this lien in the statutes of California (Civil Code, ed. 1885, § 3049); Dakota (Comp. Laws, 1887, § 4439); Louisiana (R. Civ. Code, §§ 3227-3231); and Tennessee (Code, 1884, § 2761).] J. B. U.

Supreme Court of Minnesota.

MINNEAPOLIS THRESHING MACHINE CO. v. DAVIS.

A subscription by a number of persons to the stock of a corporation, to be thereafter formed by them, constitutes, *first*, a contract between the subscribers themselves to become stockholders when the corporation is formed, upon the conditions expressed in the agreement, and as such it is binding and irrevocable from the date of the subscription; *second*, it is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it, becomes as to each subscriber, a contract between him and the corporation.

A promoter of a proposed corporation, who solicits and procures stock subscriptions upon a written subscription paper, is the agent of the body of the subscribers to hold the subscriptions until the corporation is formed, and then turn them over to it without any further act of delivery on the part of the subscribers. Hence, a delivery of a subscription paper to such promoter is a complete delivery as to the subscriber making such delivery, so that it becomes, *eo instanti*, a binding contract as between the subscribers.

Where a person subscribes to the stock of the proposed corporation and delivers the subscription to such promoter, and other persons, without notice of any oral condition attached to such delivery, also subscribe to the stock and pay the same in, and in reliance on the subscriptions the corporation is organized, engages in its business, expends large sums of money, and contracts liabilities therein, such person, when sued for instalments due on his stock subscription, will not be allowed to defeat a recovery by showing that he attached a secret oral condition to the delivery of his subscription to the promoter.

Appeal from an order of the District Court for Hennepin County, refusing a new trial after judgment for the defendant.

The material facts are stated in the opinion of the Court.

C. M. Pond, for appellant.

Ferguson & Kneeland, for respondent.

MITCHELL, J., January 31, 1889. This was an action to recover instalments due on subscriptions to stock of the plaintiff. The facts fully appear from the findings of the court in connection with exhibits A and B attached to the complaint.

Those material for present purposes are, that a scheme having been started to organize a manufacturing corporation with \$250,000 capital, whose works should be located at Junction City, near Minneapolis, and one McDonald having proposed that, if the citizens of Minneapolis would subscribe \$190,000 to the capital stock, he would subscribe the remaining \$60,000, one Janney, a promoter, but not a subscriber to the stock of

the proposed corporation, acting as a voluntary solicitor, having with him the subscription paper (Exhibits A and B), about April 1st, 1887, proceeded to canvass for subscriptions to the stock of the proposed corporation on the terms and conditions embodied in the paper. He first applied to defendant, who subscribed to \$5,000 of stock. Afterwards, and about the same date, other citizens respectively subscribed to the stock, on the same paper, to the aggregate amount, including defendant's subscription, of \$190,000, of which over \$65,000 has been paid in to plaintiff. Thereupon McDonald, in accordance with his proposition, subscribed the remaining \$60,000, which he has paid up in full. All the conditions expressed in the written subscription (Exhibit A), having been fully performed and complied with, the proposed corporation was afterwards, about April 25th, 1887, organized, and these subscriptions to its stock delivered over to it. The corporation, acting in good faith upon such subscriptions, including that of defendant, expended large sums of money in locating and constructing its works, and entered into large contracts, and incurred liabilities to the amount of over \$75,000. During all this time the corporation had no notice or knowledge of any condition being attached to defendant's subscription, other than those expressed in the subscription paper itself. Neither is it found or claimed that any of the other subscribers to the stock had any such notice or knowledge. Defendant was not present at the organization of the corporation, and never attended or took part in any of its meetings, and had no notice or knowledge that the subscription paper had been transferred or delivered over to plaintiff, or that plaintiff relied on it, until about November, 1887, just prior to the commencement of this action.

Upon the trial, the defendant was permitted, against plaintiff's objection and exception, to testify that he signed or subscribed to the stock only upon the express oral condition and agreement then had between him and Janney, that the latter should retain in his possession said agreement with his name signed thereto, and not deliver it to any one, or use it in any way, until certain four persons should subscribe to the stock, each in the sum of \$5,000; that Janney took the agreement from defendant on that express condition and understanding,

and not otherwise; that none of these four persons ever did subscribe to the stock of the plaintiff; and that defendant never authorized Janney or any one to deliver said agreement to any one except upon the condition referred to. The Court found the facts to be in accordance with the testimony, and upon that ground found as a conclusion of law, that defendant never became a subscriber to the plaintiff's stock. The competency of this evidence is the sole question in this case. Under the elementary rule of evidence that a written agreement cannot be varied or added to by parol, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. The condition must be inserted in the writing to be effectual. This rule applies with special force to a case like the present, where to allow the defendant now to set up a secret parol arrangement by which he may be released, while his fellow-subscribers continue to be bound, would be a fraud, not only upon them, but upon the corporation which has been organized on the faith of these subscriptions, and upon its creditors. The defendant, of course, does not attempt to controvert so elementary a rule as the one suggested, but contends that the effect of this evidence was not to vary or contradict the terms of the writing, but to prove that there was never any delivery of it, and hence that there never was any contract at all, delivery being pre-requisite to the very existence of a contract. His claim is that the subscription paper was given to and received by Janney merely as an escrow, or as in the nature of an escrow, only to be delivered or used upon the performance of certain conditions precedent, and that until they were performed there could be no valid delivery.

In determining this question, it becomes important to consider the nature of a subscription to the stock to a proposed corporation, and the relation of the different parties to each other, under the facts of this case. A subscription by a number of persons to the stock of a corporation to be thereafter formed by them, has in law a double character. *First*, it is a contract between the subscribers themselves to become stockholders, without further act on their part, immediately upon the formation of the corporation. As such a contract, it is binding and irrevocable from the date of the subscription, (at

least in the absence of fraud or mistake,) unless cancelled by consent of all the subscribers before acceptance by the corporation. *Second*, it is also in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber, a contract between him and the corporation: 1 Morawetz on Priv. Corp., sec. 47 *et seq.*; *Red Wing Hotel Co. v. Friedrich* (1879), 26 Minn. 112. Janney, the promoter who solicited and obtained the subscriptions, occupied the position of agent for the subscribers as a body, to hold the subscriptions until the corporation was formed in accordance with the terms and conditions expressed in the agreement, and then turn it over to the company without any further act of delivery on part of the subscribers. The corporation would then become the party to enforce the rights of the whole body of subscribers.

It follows, then, that considering the subscription as a contract between the subscribers, a delivery to Janney by any subscriber, was a complete and valid delivery, so that his subscription became, *eo instanti*, a binding contract. The case stands precisely as a case where a contract is delivered by the obligor to the obligee. It cannot therefore be treated as a case where a writing has been delivered to a third party in escrow. The defendant, however, attempts to bring the case within the rule of *Westman v. Krumweide* (1883), 30 Minn. 313, in which this Court held that parol evidence was admissible to show that a note delivered by the maker to the payee, was not intended to be operative as a contract from its delivery, but only upon the happening of some contingency, though not expressed by its terms; that is, that the delivery was only in the nature of an escrow. We so held upon what seemed the great weight of authority, although the doctrine, even to the extent it was applied in that case, is a somewhat dangerous one. The distinction between proving by parol, that the delivery of a contract was conditional, and that the contract itself contained a condition not expressed in the writing, is one founded more on refinement of logic than upon sound practical grounds. It endangers the salutary rule that written contracts shall not be varied by parol. Said ERLE, J., in *Pym v. Campbell* (1856), 6 E. & B. 370, in sustaining such a de-

fense, "I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defense with suspicion." And in all the cases where such a defense has been sustained, so far as we can discover, they have been cases strictly between the original parties, and where no one has changed his situation in reliance upon the contract and in ignorance of the secret oral condition attached to the delivery, and hence no question of equitable estoppel arose. Many of the cases have been careful to expressly limit the rule to such cases: *Benton v. Martin* (1865), 31 N. Y. 382; *Sweet v. Stevens* (1863), 7 R. I. 375.

Conceding the rule of *Westman v. Krumweide*, *supra*, to its full extent, there are certain well recognized doctrines of the law of equitable estoppel which render it inapplicable to the facts of the present case. This subscription agreement was not intended to be the sole contract of the defendant. It was designed to be also signed by other parties, and from its very nature the defendant must have known this. Each succeeding subscriber executed it more or less upon the faith of the subscriptions of others preceding his. The paper purports on its face to be a completed contract, containing all the terms and conditions which the subscribers intended it should. When this agreement was presented to others for subscription, defendant had not only signed it in this form, but he had also done what, under the facts, constituted to all outward appearances at least, a complete and valid delivery. He had placed it in the proper channel according to the ordinary and usual course of procedure, for passing it over to the corporation, when organized, and clothed Janney with all the *indicia* of authority to hold and use it for that purpose, without any other or further act on his part, untrammelled by any condition other than those expressed in the writing. In reliance upon this, others have not only subscribed to the stock but have since paid in a large share of it. The corporation has been organized and engaged in business, expending large sums of money, and contracting large liabilities, all upon the strength of these subscriptions to its stock, and in entire ignorance of this secret oral condition which defendant now claims to have attached to the delivery.

To permit defendant to relieve himself from liability on any such ground under this state of facts, would be a fraud on others who have subscribed and paid for stock ; on the corporation which has been organized and incurred liabilities in reliance upon the subscriptions ; and on creditors who have trusted it. The familiar principle of equitable estoppel by conduct applies, viz., where a person by his words or conduct wilfully causes another to believe in the existence of a certain state of facts, and induces him to act in that belief so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other.

We have examined all of the numerous cases cited by the defendant's counsel, and fail to find one which, in our judgment, is analogous in its facts, or the law of which will cover the present case. The two which at first sight might seem most strongly in his favor are *Railroad Co. v. Palmer* (1865), 19 Wis. 574, and *Railroad Co. v. Hall* (1878), 1 Bradw. (Ill.), 612. But an examination of those cases will show that in neither did or could any question of estoppel arise, and in both the Court held that the person to whom the instrument was delivered after signature, was a stranger to it, so that it was strictly a delivery in escrow to a third party.

Cases are cited, where a surety signed a bond or non-negotiable note, and delivered it to the principal obligor, upon condition that it should not be delivered to the obligee until some other person signed it, and where, without such signature, the principal obligor delivered it to the obligee, and yet the courts held that the surety was not liable, although the obligee had no notice of the condition. Such cases usually, too, proceed upon the theory that a delivery to the principal obligor under such circumstances is a mere delivery in escrow to a stranger ; the term "stranger," in the law of escrows, being used in opposition merely to the party to whom the contract runs. It may well be doubted whether in such cases, where the instrument is complete on its face, the courts have not sometimes ignored the law of equitable estoppel. No such defense would be allowed in the case of negotiable paper, and it is not clear why the distinction should be drawn on that line. The doctrine of estoppel rests upon totally different grounds, and

operates independently of negotiability, being founded upon principles of equity. But whether the cases referred to be right or wrong, we do not see that they are in point here. Our conclusion is that the Court erred in admitting the evidence objected to, and for that reason a new trial must be awarded.

Order reversed.

1. *The General Rule.*—The established rule of evidence, that a written contract is not to be contradicted or varied by evidence of a parol agreement or understanding, is applied to cases of subscription to the stock of corporations. One reason for so applying this rule is, that, if such evidence were admitted, it would tend strongly towards the commission of a fraud upon other subscribers to the stock: Angell and Ames on Corporations, Sec. 531; Waterman on Corporations, Sec. 193; Cook on Stockholders, Sec. 137.

This principle, enlarged by judicial construction into an equitable estoppel, is applied by the Court in the principal case. It was palpable that the admission of such evidence, for the purpose of a judgment in favor of the defendant, operated unjustly toward other subscribers, who had made their stock subscriptions and became bound thereby, and made payments thereon, in reliance upon the subscription of the defendant.

It is only where the evidence of the parol agreement tends to prove fraud, accident or mistake, that it can be admitted in evidence and considered: Cook on Stockholders, Sec. 137; Waterman on Corporations, Sec. 192; Angell & Ames on Corporations, Sec. 531.

The term "conditional subscription" does not apply to the parol contract set up by defendant in the principal case. Conditional subscriptions proper, are those only in which the condition is a part of the subscription. There are such conditions to the subscription in

that case. But oral agreements, contemporaneous with a subscription, will not fall under this head; they are to be considered under the head of fraud, accident or mistake: Cook on Stockholders, Secs. 77, 137.

The release of other stockholders is no defence to an action on a subscription: Cook on Stockholders, Sec. 191.

In England, it has been held that, in such cases, the proper remedy of the subscriber, who complains of the violation of the parol agreement, is by action against the promoter who made the agreement with him: *Felgate's Case* (1865), 2 De G. J. and S. 456.

2. *Authorities Classified.*—The circumstance that the subscription in the principal case was given for the purpose of organizing a new corporation, furnishes ground for a distinction between the various cases that have previously been decided.

An examination of the authorities, with reference to this distinction, suggests this classification.

In the following named cases, the rule was applied to subscriptions, given before the organization of the corporation, for the purpose of promoting the particular corporation: *R. R. Co. v. Mason* (1857), 16 N. Y. 451 (attempt by subscriber to revoke subscription); *R. R. Co. v. Cross* (1859), 20 Ark. 443 (declaration by promoter as to location); *R. R. Co. v. Leach* (1857) 4 Jones (N. C.), 340; *Miller v. R. R. Co.* (1878), 87 Pa. 95 (location of road); *Caley v. R. R. Co.* (1876), 80 Id. 363; *Wight v. Shelby R. R.* (1855), 16 B.

Mon. (Ky.) 4 (a delivery of subscription claimed to be an escrow); *R. R. Co. v. Gammon* (1858), 5 Sneed (Tenn.) 567, 571 (that subscribers should have a voice in location of road); *R. R. Co. v. Bonser* (1864), 48 Pa. 29.

In the following named cases, the same rule was applied to subscriptions to an existing corporation: *Ferry Co. v. Jones* (1859), 39 N. H. 491, 497; *McClure v. R. R. Co.* (1879), 90 Pa. 269, 271; *McCarty v. R. R. Co.* (1878), 87 Id. 332; *Scarlett v. Academy of Music* (1876), 46 Md. 132, 149; *Cowith v. Culver* (1873), 69 Ill. 502, 506; *Gelpcke v. Blake* (1863), 15 Iowa 387; *Jack v. Naber* (1863), 5 Id. 450; *Downie v. White* (1860), 12 Wis. 176; *R. R. Co. v. Stevens* (1855), 6 Ind. 379; *R. R. Co. v. Pearce* (1867), 28 Id. 502; *R. R. Co. v. Brush* (1875), 43 Conn. 86.

3. *The Views of the Courts.*—In *Wight v. Shelby R. R.* (1855), 16 B. Mon. (Ky.) 4, the claim by the subscriber being that the delivery of his subscription was simply in escrow, and also that he had a parol condition as to the location of the road, the Court held that the party to whom the subscription was delivered, being one of the commissioners for the subscription to the road, could not receive it in escrow; for, to make it an escrow, required that the writing be put in the hands of a third party. The Court said as follows:

“The defense relied upon by Wight, that the subscription of stock made by him was left with one of the commissioners in the nature of an escrow, is wholly invalid. The commissioners were the persons appointed by the charter to receive and accept subscriptions of stock. A subscription received by them, even if such a writing could under any circumstances be made to assume the nature and attributes of an escrow, could not take that character, inasmuch as when it was received by

them, it became just as obligatory on the party making it as a promissory note would be upon the maker who left it with the payee, or his agent. The well settled doctrine is, that to make a writing an escrow merely, it must be placed in the hands of a third person by the party making it, to be delivered to the other party on the happening of a specified contingency. Here the subscribers were the parties on one side, and the commissioners on the other. A subscription when made and received by the commissioners, could not, therefore, be a mere escrow, but became in law an absolute undertaking for the stock subscribed according to the provisions of the charter. So far as the defendants, or either of them, alleged that the subscription was conditional, and was not to be obligatory on them, unless the road was located on a certain route, it is only necessary to remark that the contract being in writing, parol proof is inadmissible, to alter its terms or to show that instead of being absolute as it purports to be, it was in reality conditional. The subscribers might have annexed a condition to the terms of their subscription, if they had thought proper to do so, and it would then have been with the commissioners to determine whether such conditional subscription of stock would be received; but not having done so, they cannot, according to the well established doctrine on the subject, allege or prove that the contract was different from that which is evidenced by the writing unless they can establish fraud or mistake in its execution.”

In *Miller v. R. R. Co.* (1878), 87 Pa. 95, the Court said:

“Every one who signed after him, did so on the faith of his signature, * * * and to permit him now to set up a secret parol arrangement, by which he may be released whilst his fellows continue to be bound, would be any-

thing but just. As was said in the case of *Graff v. R. R. Co.* (1858), 31 Pa. 489, a subscription to a joint stock company is not only an undertaking to the company, but with all other subscribers."

In *R. R. Co. v. Gammon* (1858), 5 Sneed (Tenn.) 367, where the parol condition set up was, that the subscriber should have voice in the location of the road, the Court said: "By his subscription for a certain number of shares, at a certain sum, he became liable for the amount of his subscription, on the same principle that the maker of a promissory note renders himself liable. The subscription being equivalent to a promissory note, it is clear that parol evidence of previous or contemporaneous negotiations, stipulations or terms, not incorporated in the subscription paper, could not be admitted to vary or contradict the terms of the written instrument.

In *Ferry Co. v. Jones* (1859), 39 N. H. 491, the defendant set up a representation to him by another subscriber, not an officer, that the ferry to be built was to be a horse ferry; in fact, a steam ferry was built. It was held that the party making the representation was not an agent of the company, and that the company would not have been bound by the representation, even if he had been its agent. The Court said:

"Another question raised is, whether the representation made at the time the defendant and Somerby subscribed for stock, by the person who had the paper, was competent evidence to be considered, and if so, was it material? Did it or could it affect the case? We think it was not competent, and would not have been so, even if the person making it had been the agent of the company. It was only a verbal statement, and does not come within the rule stated in *White Mountains R. R. v. Eastman* (1856), 34 N. H. 124, where it was

held that a contract, *in writing*, given back to a subscriber for stock, at the same time of the subscription, by an agent of the company authorized to contract, providing that the terms of the subscription might be modified in a certain way, might be valid as part of the original contract of subscription, as between the parties, provided it did not operate as a fraud upon others. But this case is more like *George v. Harris* (1829), 4 N. H. 533, where it was held that where a promise is direct, positive, unconditional, and in writing, parol evidence is inadmissible to contradict or vary such contract. And the further reason then stated also applies here, that the defendant's putting upon paper an unconditional promise to pay, may have induced others, not only to subscribe, but to pay, and his attempts now to shield himself by this private understanding may be a fraud upon others, who have thus been induced to subscribe and to pay. Parol agreements, made at the time of subscribing for stock, and inconsistent with the written terms of subscription, are inadmissible, inoperative and void: *Conn. & Pass. River R. R. v. Bailey* (1852), 24 Vt. 465."

In *McCarty v. R. R.* (1878), 87 Pa. 332, the subscriber alleged a parol condition, that the road was to be built to a certain point; and a further promise by the officers of the road to incorporate this condition into his subscription; so that the case turned on a question of fraud. The Court said as follows:

"Where subscriptions are made to the stock of a proposed public corporation, previous to and for the purpose of procuring a charter, any condition annexed thereto, whether written or parol, are void. But after the organization of the company, a condition is binding and obligatory, and ordinarily, this is so, though it rests in parol, if, except for such condition, the subscription

would not have been made. The latter part of this proposition is subject, however, to the qualification that the rights of co-subscribers are not affected thereby: *R. R. v. Bowser* (1864), 48 Pa. 29; *Caley v. R. R. Co.* (1876), 80 Id. 363; *Graff v. R. R. Co.* (1858), 31 Id. 489; and *Miller v. R. R. Co.* (1878), 87 Id. 95."

In *Corwith v. Culver* (1873), 69 Ill. 502, the defendant had never delivered the subscription. It had remained in his possession, and had never passed into the hands of the corporation. Defendant claimed that it was to be delivered only on condition that he could effect a certain loan, which he had failed to do. It was held to be a valid subscription. The Court said:

"The subscription by the defendant was absolute on its face; it is inadmissible to show that it was only conditional. The rule forbidding the introduction of parol evidence to explain a written instrument, meets with no exception in the case of a subscription paper for stock of a corporation: *Angell and Ames on Corp.*, § 146; *Bancet v. A. & S. R. R. Co.* (1851), 13 Ill. 509. Such a secret condition attached to the subscription, would be a fraud upon the other subscribers, and the subscription should be enforced without regard to it: *Downie v. White* (1860), 12 Wis. 176; *White Mount. R. R. v. Eastman* (1856), 34 N. H. 124; *Mann v. Cook* (1850), 20 Conn. 178; *Smith v. Heid-ecker* (1866), 39 Mo. 157."

In *R. R. Co. v. Brush*, 43 Conn. 86 the language of the Court was as follows:

"When Myers & Co. subscribed, the contract for building the road had not been executed. The subscription therefore was not then affected by the written contract. The parol agreement cannot, upon any principle, have the effect to vary or qualify the written contract of subscription. It is familiar and elemen-

tary law, that all negotiations between the parties, relating to the subject matter, are merged in the written contract. Neither party will, therefore, be permitted to prove by parol, a contract different from that expressed in the written instrument. Is it so that a party, for the purpose of relieving himself of an obligation, will be permitted to show by parol that this written contract is different from what it purports to be on its face? We are not aware of any principle of law that will justify such a proceeding."

4. *Delivery in Escrow*.—Among the cases above cited are the following, in which the question was, as in the principal case, one of a condition to the delivery of the subscription: *Wight v. R. R. Co.* (1855), 16 B. Mon. (Ky.) 4; *Corwith v. Culver* (1873), 69 Ill. 502.

There are two cases found in the books, in which the parol condition as to delivery, was allowed to defeat the subscription and excuse the subscriber from compliance; but each of these cases is one of subscription to the stock of an already existing corporation. These are the two named in the principal case: *R. R. Co. v. Palmer* (1865), 19 Wis. 574; *R. R. Co. v. Hall* (1878), 1 Bradw. (Ill.) 612.

In the Wisconsin case, the subscription was not signed by the supposed subscriber, but by another person for him, who was a promoter, not of the corporation, but of the particular subscription. The supposed subscriber authorized the delivery of this subscription, only upon certain conditions which had not been performed. The Court held, that as the promoter who received the subscription was not an agent of the company, he was therefore a third party; so that the principles as to a delivery in escrow were applicable. In the Illinois case, there was a conditional delivery of the subscription in escrow to the Director of the Railroad Com-

pany; and the Court held that the facts of the case made this director a third party, so that the delivery was really in escrow.

There are other cases, seemingly analogous here, yet to be distinguished by their facts. In *Ticonic Water Co. v. Lang* (1874), 63 Me. 480, the question of delivery related to a proxy. One defendant had never subscribed to the stock at all; and he had delivered a proxy in escrow, which was considered in the case. *Cass v. Railway Co.* (1875), 80 Pa. 31, is not in point. It was a case of an existing corporation and a written condition in a subscription. The agent of the company took the subscription in escrow. It was held that this agent had no authority to accept the written condition, hence, there was no delivery. *Burrows v. Smith* (1853), 10 N. Y. 550, a case in equity, did not turn on the question of a parol condition to a written subscription. Plaintiff did not sue on the written subscription; his suit was an effort to set up another and different subscription by estoppel, against which the Equity Court let in evidence of parol stipulations.

The principal case is the first one in which an appellate court has passed upon the question of an attempted condition to the delivery of a stock subscription given for the purpose of promoting a new corporation.

5. *The Status of the Subscription Agreement.*—The ruling in the principal case as to the double character of the subscription agreement, is well supported by authority. It is a general rule that an agreement to take shares in order to form a corporation, is a continuing offer, subject to acceptance by the corporation after it is formed: 1 Morawetz on Corporations, Sec. 47, 48, 51. The subscription inures to the benefit of the corporation when formed: Waterman on Corporations, Sec. 177;

R. R. Co. v. Gammon (1858), 5 Sneed (Tenn.) 567; *Taggart v. R. R. Co.* (1866), 24 Md. 563; *R. R. Co. v. Clayer* (1848), 21 Vt. 30; *R. R. Co. v. Dummer* (1855), 40 Me. 172; *R. R. Co. v. Mason* (1857), 16 N. Y. 451.

The subscriber's interest in, and his right to, a share in the operations of the company, are the consideration for his contract: 1 Morawetz on Corporations, Sec. 56; *R. R. Co. v. Robbins* (1877), 23 Minn. 439; *Music Hall Co. v. Cary* 116 Mass. 471; *R. R. Co. v. Clayer*, 31 Vt. 30.

The corporation is the proper party to bring suit on such subscription: 1 Morawetz on Corp., Sec. 50; Cook on Stockholders, Sec. 67; *Music Hall Co. v. Cary* (1874), 116 Mass. 471; *Upton v. Tribilcock* (1875), 91 U. S. 45; *Chubb v. Upton* (1877), 95 Id. 665.

Mr. Taylor's full statement of the doctrine is as follows:

"The corporation having been formed, and A, not having in the meantime withdrawn from the agreement, if B, C and D, etc., take and pay for their shares as agreed, they (or the corporation, if it shall appear to have been the intention that the corporation should have the right to enforce the promise) can then force A to take and pay for his shares as well; for if, relying on A's promise, or, more strictly speaking, unwithdrawn offer to take shares, B, C and D, etc., have actually taken shares themselves, they have thereby accepted A's unwithdrawn offer, by performing that act, which was intended to be, when performed, a valid consideration, which should convert A's unwithdrawn offer into a binding promise; and in truth, therefore, they have thus transformed A's unwithdrawn offer into a binding promise, the performance of which may be enforced by the parties who have themselves performed, or by the corporation, if such was the intention:" Taylor on Corporations, 93.

The Supreme Court of Pennsylvania declares as follows:

"The contract of subscription is not only with the company, but also with all the other shareholders; hence, the subscriber may not set up even fraud of

the directors, in order to defeat his contract:" *Caley v. R. R. Co.* (1876), 80 Pa. 363, 368; *Graff v. R. R. Co.* (1858), 31 Id. 489.

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ABSTRACTS OF RECENT DECISIONS.

ADMIRALTY.

Contract to stow, or load, a vessel, is not a maritime contract, and cannot be enforced in admiralty. *Danace v. The Magnolia*, U. S. C. Ct. E. D. La., Jan. 22, 1889.

Stevedore's claim for services in loading or unloading a vessel is a maritime contract, within the principles of admiralty jurisdiction, but no lien on the vessel is allowed for such services rendered in the home port. *Mygatt v. The Gilbert Knapp*, U. S. D. Ct. E. D. Wis., Jan. 7, 1889.

AGENCY.

Commission broker, who, with knowledge of its unlawful character, negotiates a gambling contract, becomes a *particeps criminis*, and cannot recover for services rendered or losses incurred by him in forwarding the illegal undertaking. *Kahn v. Walton*, S. Ct. Ohio, Jan. 8, 1889.

Commissions are earned by a real estate broker, where the agreement of sale provides that the land is to be conveyed within fifteen days, on condition that one holding a mortgage thereon shall release the vendor from liability, and that, if the vendee shall fail to pay the purchase money at the end of the fifteen days, any money paid in advance shall be forfeited, although the mortgage is not released nor the purchase money paid. *Ward v. Cobb*, S. Jud. Ct. Mass., Feb. 28, 1889.

Undisclosed principal, for whom one in reality carries on business, although in the latter's own name, is liable for goods sold to the agent on credit, notwithstanding the fact that secret orders had been given not to buy on credit. *Hubbard v. Tenbrook*, S. Ct. Pa., Feb. 25, 1889.

ATTORNEY-AT-LAW.

Lien upon judgment recovered in favor of his client, for the fees of an attorney, does not extend to property purchased by the client with the proceeds of such judgment; and when the attorney consents that the amount of the judgment shall be paid to the client, stating his willingness to look to the latter alone for his fees, he thereby waives any lien he might have had on the proceeds. *Goodrich v. McDonald*, Ct. App. N. Y., Jan. 15, 1889.

BANKS AND BANKING.

Collection of checks was made by one bank for another under an agreement, by which no debt was to be created until such checks had actually been paid to the collecting bank; a check was sent by the latter to a third bank for collection, and, before the proceeds had been remitted, the second bank became insolvent; the first bank was thereupon entitled to recover from the third bank the amount of the check. *Manufacturers' Nat. Bank v. Continental Bank*, S. Jud. Ct. Mass., Feb. 28, 1889.

Increase of capital stock by national bank, made without obtaining the consent of two-thirds of the stock, the payment in full of the amount of such increase, or the certificate and approval of the comptroller of the currency, as required by statute, is invalid, and preliminary subscriptions to such increase cannot be enforced. *Winters v. Armstrong*, U. S. C. Ct. S. D. Ohio, Jan. 28, 1889.

Note of depositor, made payable at a bank where he deposits, is not equivalent to a check, and the bank has no authority to pay such note to a third party, in the absence of a usage or of instructions from the maker to that effect. *Grissom v. Commercial Nat. Bank*, S. Ct. Tenn., Feb. 23, 1889.

BICYCLES.

Riding a bicycle against a pedestrian, who is facing the other way, the walk being fourteen feet wide and the view unobstructed, is an assault and battery, although the injury is unintentional, and the rider is liable in damages. *Mercer v. Corbin*, S. Ct. Ind., Feb. 23, 1889.

BILLS AND NOTES.

Assignment of judgment obtained against the maker of a promissory note by the holder, estops the latter from bringing suit upon the note against an indorser. *Moorman v. Wood*, S. Ct. Ind., Jan. 29, 1889.

Indorser in blank, under the name of the payee, *prima facie* assumes the obligation of a maker. *Nat. Bank v. Dorset Marble Co.*, S. Ct. Vt., Feb. 1, 1889.

CHATTEL MORTGAGE.

Machinery in factory, when mortgaged by the purchaser for the purchase price, an oral agreement being made that it shall be treated as personalty until paid for, and when the realty, to which it is afterwards attached, will not be injured by its removal, will be considered as personal property, as between the chattel mortgagee, and a prior mortgagee of the realty. *Binkley v. Forkner*, S. Ct. Ind., Jan. 30, 1889.

CHECKS.

Revocation of check may be made by the drawer at any time before its presentation for payment, unless it has been accepted or certified by the bank, and an affirmative answer by the bank to a

question whether a check of a person named, for a specified sum, is good, does not constitute an acceptance or certification of such check. *Kahn v. Walton*, S. Ct. Ohio, Jan. 8, 1889.

CONSTITUTIONAL LAW.

Statute imposing liability upon every railroad corporation which shall damage and kill any horse by running against it with an engine, is unconstitutional and void, as imposing such liability without any negligence or breach of duty on the part of the corporation. *Bielenberg v. Montana Union Ry. Co.*, S. Ct. Mont., Feb. 2, 1889.

COPYRIGHT.

Form for application for a license to sell liquor, composed of three blanks—a "petition," a "bond and warrant," and a "justification"—all intended to be filled up and signed by the applicant, is a subject of valid copyright. *Brightly v. Littleton*, U. S. C. Ct. E. D. Pa., Nov. 24, 1888.

Photograph, artistically designed to illustrate a musical composition, is infringed by stamping an imitation in raised figure on leathern chair bottoms and backs. *Falk v. Howell*, U. S. C. Ct. S. D. N. Y., Dec. 20, 1888.

CORPORATIONS.

Contract with subscriber to the organization stock of a corporation that, for every share subscribed, he shall receive interest bearing bonds to an equal amount, secured by mortgage on the plant of the corporation, is void, not only as against creditors, but also as between the subscriber and the corporation; the agreement to issue bonds is not a condition precedent and the stock subscription stands absolute, although the agreement is void. *Morrow v. Nashville Iron and Steel Co.*, S. Ct. Tenn., Feb. 5, 1889.

Stock subscription creates a debt against the subscriber, and upon his assignment for the benefit of creditors and the insolvency of the corporation, a creditor of the latter may enforce his claim against the assigned estate of the subscriber, although no calls on the subscription had been made at the time of the assignment. *Samainego v. Stiles*, S. Ct. Ariz., Feb. 13, 1889.

DEED.

Prior contract to convey to a university, upon the performance of certain acts by the latter, a tract of land "for the sole and exclusive use of the university, inalienable for any other use or purpose forever," does not restrict the effect of a subsequent deed to the university for the same land, absolute on its face, with the usual covenants and containing no condition against alienation nor reference to the contract, even though the acts stipulated in the contract have not been performed. *Douglas v. Union Mut. Life Ins. Co.*, S. Ct. Ill., Jan. 25, 1889.

DONATIO CAUSA MORTIS.

Gift by husband to wife, on the day of his death, of a savings bank book, unaccompanied by actual delivery, is invalid, though at the time of the gift the book was already in the possession of the donee. *Drew v. Hagerty*, S. Jud. Ct. Me., Jan. 18, 1889.

EMINENT DOMAIN.

Mortgagor in possession gave his consent to a railroad's entering upon and constructing its line across the mortgaged premises, without the payment of any damages; after a foreclosure of the mortgage, and a purchase of the land by the mortgagee, the latter was not entitled to claim the *corpus* and improvements of the railroad as his own, nor to compensation for the taking of the land. *St. Johnsbury & L. C. R. R. Co. v. Willard*. S. Ct. Vt., Feb. 1, 1889.

FIRE INSURANCE.

By-law of a mutual insurance company, which provides that no insurance shall be binding until the cash premium shall have been actually paid to some "duly authorized and commissioned" agent of the company, may be waived by an officer of such company, and a provision in the policy that a waiver of "any printed or written condition or restriction therein" must be in writing and endorsed on the policy, does not apply to the waiver of a by-law, although the by-laws are made, by the terms of the policy, part of the contract. *Susquehanna Mut. Fire Ins. Co. v. Elkins*, S. Ct. Pa., March 11, 1889.

Marriage contract, by which a wife has waived all her rights of dower and homestead, and in lieu thereof is to have a life estate, from the death of her husband, in a dwelling-house and tract of land, does not entitle her, after her husband's death, to the proceeds of a fire policy on such house, issued to the latter, payable to himself, his executors or administrators, and to be void "in case any change shall take place in title or possession, except by succession by reason of the death of the assured"; her title is not by succession, but by purchase. *Quarles v. Clayton*, S. Ct. Tenn., Feb. 12, 1889.

Other insurance, when prohibited, renders a policy void only at the option of the insurer, and a policy issued in violation of such a prohibition will constitute "other insurance," so as to avoid another policy upon the same property. *Saville v. Aetna Ins. Co.*, S. Ct. Mont., Feb. 2, 1889.

FRAUD.

False representations that a railroad bond, offered for sale, is "A No. 1" bond, and that the security is good, will not sustain an action for deceit, when the party making such representations was known by the purchaser to stand in the position of a seller and the market price could have been readily ascertained. *Deming v. Darling*, S. Jud. Ct. Mass., Feb. 28, 1889.

GAMBLING CONTRACT.

Contract for sale of personal property, to be delivered at a future day, if it is intended that the goods shall be delivered and paid for, is valid, though the seller has no such goods, nor any means of getting them, except by going into the market and buying; but when the real intention is merely to speculate on the rise and fall in prices, and the goods are not to be delivered, only the difference between the contract price and the market price at the time specified for executing the contract, being paid, the transaction is against public policy and void. *Kahn v. Walton*, S. Ct. Ohio, Jan. 8, 1889.

Profits, arising from an illegal and speculative deal in wheat, paid by one of the parties to the broker who negotiated the transaction, to be paid over by him to the other party, can be recovered in an action by the latter against the broker, notwithstanding the fact that original contract was not enforceable. *Floyd v. Patterson*, S. Ct. Tex., Dec. 4, 1888.

HUSBAND AND WIFE.

Lottery prize, received on a ticket purchased with the separate money of a married woman, is community property, under a statute which provides that all property acquired by either husband or wife during marriage, except by gift, devise or descent, shall be deemed the common property of both. *Dixon v. Sanderson*, S. Ct. Tex., Dec. 21, 1888.

INTERSTATE COMMERCE LAW.

"*To*," in the first and second sections of the Act to regulate commerce, means the destination of the property into, or at any place within the State or foreign country, reached by the continuous carriage or shipment, and the regulation intended is from the origin to the destination of the carriage. *In re Grand Trunk Ry. Co.* The Commission, April 18, 1889.

JUDGMENT.

Validity of decree against lunatic, who was insane when process was served upon him and was not represented in the suit by a conservator or guardian, the suit having been brought in ignorance of his insanity, cannot be questioned in a collateral proceeding. *Maloney v. Dewey*, S. Ct. Ill., Jan. 25, 1889.

JURISDICTION.

Action for penalty imposed by a State statute upon railroad companies guilty of extortion, "to be recovered in a civil action by ordinary proceedings instituted in the name of the State," cannot be removed to the Federal courts; it is, in effect, a criminal action, and the nature, not the form, of an action determines the question of removal. *State of Iowa v. Chicago, B. & Q. R. R. Co.*, U. S. C. Ct. S. D. Iowa, Jan. 22, 1889.

LIBEL.

Extract from newspaper, indicating that a neighboring ticket broker was not a safe and reliable person from whom to buy tickets, was conspicuously posted for a period of forty days in the ticket-office of a railroad company, which was in charge of the company's agent; under these circumstances a finding that the company had knowledge of the publication and that it was made by the agent in the course of the company's business, is sustained by the evidence. *Fogg v. Boston & L. R. Co.*, S. Jud. Ct. Mass., Feb. 28, 1889.

LIFE INSURANCE.

Creditor, who takes out insurance certificates, amounting to \$6,500, on the life of a debtor, who owes him \$1,000, in mutual aid associations, where the sum to be realized depends on the number and solvency of the members, and, upon the debtor's death, actually realizes only \$2,124.82 from the certificates, is entitled to retain the whole amount thus received. *Rittler v. Smith*, Ct. App. Md., Feb. 21, 1889.

LIQUOR LAWS.

Recovery of damages cannot be had under a statute giving a right of action to persons injured in person or means of support in consequence of intoxication, against "any person who shall by selling or giving intoxicating liquors have caused the intoxication," from one who gives liquor to a friend, in his own home or elsewhere, as a mere act of courtesy and politeness, without any purpose of pecuniary gain; such statute applies only to persons engaged, either directly or indirectly, in the liquor traffic. *Cruse v. Aden*, S. Ct. Ill., Jan. 26, 1889.

MARINE INSURANCE.

General average expenses incurred in rescuing a vessel from a peril brought about by negligence in her navigation, cannot be recovered under a policy, which exempts the underwriter from liability for "all perils, losses, misfortunes or expenses, consequent upon, or arising from, or caused by, the want of ordinary care and skill in navigating;" the negligent navigation was the proximate cause of the loss. *The Ontario*, U. S. D. Ct. E. D. Mich, Jan. 2, 1889.

MARRIAGE.

Solemnization of marriage, according to the customs of an Indian tribe, need not take place within the territory of such tribe, in order to constitute a valid marriage. *La Riviere v. La Riviere*, S. Ct. Mo., Feb. 18, 1889.

MASTER AND SERVANT.

Foreman of bridge gang upon railroad is a fellow servant with employés operating a train on the road, in the sense which precludes the former from recovering from the railroad company for injuries

resulting from the negligence of the latter ; and such foreman is "on duty," while asleep in a car provided for the purpose by the company, being liable to be called out for duty at any moment. *St. Louis, A. & T. Ry. Co. v. Welch*, S. Ct. Tex. Dec. 14, 1888.

Overseer of slashing-room in a cotton mill is a fellow-servant with the second foreman of the machine-shop department, whose duty it is to oversee the repairing of machinery in any of the departments on the report of the overseer of that department, subject to the orders of the immediate foreman and the general superintendent, and the mill-owner is not liable for an injury to the foreman caused by a barrel thrown negligently from a window by the overseer. *Brodem v. Valley Falls Co.*, S. Ct. R. I., Feb. 9, 1889.

MUNICIPAL CORPORATIONS.

Falling of walls of burnt building, nine days after a fire, does not render a municipality liable for damages caused thereby to adjoining property, although notice had been given of the dangerous condition of the walls, and the city marshal told the owner that he would take charge of the walls, and have them taken down, if necessary. *City of Anderson v. East*, S. Ct. Ind., Jan. 25, 1889.

NEGLIGENCE.

Blind person, who walks unattended in the public street, is not, as matter of law, chargeable with negligence, and such person is bound to use ordinary care only, in determining which a jury should consider his blindness and other infirmities, together with all the circumstances bearing on the question as to what care was reasonably necessary to insure his safety. *Neff v. Town of Wellesley*, S. Jud. Ct. Mass., Feb. 28, 1889.

NEGOTIABLE INSTRUMENTS.

Bottomry bills are not negotiable in the United States. *Salmon v. The Serapis*, U. S. D. Ct. S. D. N. Y., Jan. 9, 1889.

NUISANCE.

Public nuisance will not be enjoined at the instance of a private individual, unless the latter suffers some private, direct and material damage, beyond that which is suffered by the public at large, and which, without such interference, will be an irreparable injury to him. *Van Wagenen v. Cooney*, Ct. Ch. N. J., Feb. 12, 1889.

PARENT AND CHILD.

Father of boys participating with others in the ducking of a school master, who countenanced and encouraged the unlawful purpose of his sons, though not himself personally present, is liable in a civil action for the damages inflicted. *Sharpe v. Williams*, S. Ct. Kan., Feb. 9, 1889.

PATENTS.

False oath that an applicant for a patent is a citizen of the United States, when made innocently, through mistake, and without improper design, will not affect the validity of the patent. *Tondner v. Chambers*, U. S. C. Ct. W. D. Pa., Jan. 10, 1889.

Infringement of invention, before patent has been issued, although an application has been made and is pending, will not be enjoined. *Rein v. Clayton*, U. S. C. Ct. E. D. Mich., Jan. 12, 1889.

Promissory note, given in the United States for an English patent, is subject to the English rule that a promise to pay for a patent void for want of novelty, is not without consideration, although the American rule is different. *Chemical Electric Light and Power Co. v. Howard*, S. Jud. Ct. Mass., Jan. 4, 1889.

PRIVILEGE.

Non-resident, who comes from another State for the sole purpose of attending and testifying in a case to which he is a party, cannot be served with process in another suit. *Wilson v. Donaldson*, S. Ct. Ind., Feb. 16, 1889.

RAILROADS.

Contributory negligence will not be inferred where the deceased, with others, was riding slowly at ten o'clock at night towards a railroad crossing, and heard a whistle, but were uncertain whether it proceeded from the road ahead of them or from another quite near, the gate at the crossing, though usually attended when trains were passing, being open, and no flagman near; the train, by which the deceased was killed, was moving at the rate of twenty-five miles an hour, and the view of its approach was obstructed; a State statute forbade greater speed than six miles an hour at such a place, unless gates or flag-men were maintained. *Hooper v. Boston & M. R. R. Co.*, S. Jud. Ct. Me., Jan. 18, 1889.

Freight train, which ran regularly on week days as a mixed freight and passenger train, was running specially on Sunday; although the railroad was not bound to carry passengers upon such train, if it permitted them to ride, even though paying no fare, it assumed the same duties towards them, as if they had been regular passengers on a train of that character. *Wagner v. Missouri Pac. Ry. Co.*, S. Ct. Mo., Feb. 4, 1889.

Intoxicated passenger, who entered the ladies' car and by violence and indecent language alarmed the other passengers, and, when locked out of the car, pulled the bell-rope, stopping the train, and threatened the conductor with an open knife, was ejected from the train, after ten o'clock at night, two miles from the nearest station, and was killed by a later train going in the opposite direction; the place of ejection was two hundred yards from a farm house and the night was warm and not very dark; there was no negligence on the part of the railroad company. *Louisville & N. R. R. Co. v. Logan*, Ct. App. Ky., Feb. 12, 1889.

Limitation of liability of railroads to persons sustaining personal injuries or death by reason of the former's negligence, fixed by a statute which provides that, "upon the acceptance of the provisions hereof by any carrier or corporation, the same shall become a part of its act of incorporation," does not constitute a contract between the State and an accepting railroad company, having a previously granted charter, and whose road was not constructed, nor money expended, on the faith of it, but is simply the grant of a new franchise, which may be taken away by repeal. *Pennsylvania R. R. Co. v. Bowers*, S. Ct. Pa., Feb. 11, 1889.

SHIPPING.

Row-boat is not a "vessel," within the steering and sailing rule, requiring that every steamer, when approaching "another vessel," so as to involve risk of collision, shall slacken her speed, or, if necessary, stop or reverse; and a steamer is not bound to change her course for a row-boat. *Fischer v. Camden & P. Steam-boat Ferry Co.*, S. Ct. Pa., Feb. 4, 1889.

STATUTE OF FRAUDS.

Marriage alone is not such a partial performance as will take an ante-nuptial agreement between the parties, regarding their respective pecuniary rights, out of the Statute of Frauds. *Adams v. Adams*, S. Ct. Or., Jan. 15, 1889.

Parol gift of land, in pursuance of which the donee takes and holds possession for over twenty years, cultivating and making improvements to the land at his own expense, is a valid contract, though not in writing, and will be enforced in equity. *Young v. Young*, Ct. Ch. N. J., Feb. 26, 1889.

TELEGRAPHS.

Failure to deliver message received on Sunday does not render a telegraph company liable for the statutory penalty, unless there was a reasonable necessity for transmitting the message on that day and the company had notice of such necessity. *Western Union Tel. Co. v. Yopst*, S. Ct. Ind., Feb. 12, 1889.

Mental anguish is a proper element of damage in an action to recover for delay in the delivery of a telegram, announcing the death of the wife of the person to whom it was addressed and the train upon which her body would be shipped. *Western Union Tel. Co. v. Broesch*, S. Ct. Tex., Feb. 12, 1889.

Stipulation limiting the company's liability, unless the message is repeated, does not apply to an action for delay in delivering an un-repeated message. *Id.*

TRUSTS.

Absolute devise, made upon a private understanding with the devisee, either by the latter's express promise or his assent implied from his silence, that he will apply the devised estate to some pur-

pose designated by the testator, creates a trust, which, if lawful in itself, a court of equity will enforce. *Shields v. McAuley*, U. S. C. Ct. W. D. Pa., Dec. 24, 1888.

WILLS.

Bequest of library of testator to the mayor of a city, and the presidents of two medical colleges and their successors, in trust forever, for the purpose of founding a public library, to be forever kept separate from any other institution, coupled with a direction to the executors to convert testator's residuary estate into cash and to pay it to the trustees named, to be used by them in establishing such a library, is void under a statute prohibiting the suspension of the absolute ownership of property for a longer period than two lives in being at the death of the testator. *Cottman v. Grace*, Ct. App. N. Y., Jan. 29, 1889.

Cancellation of will, which expressly revoked all former wills, does not revive a prior will. *Hawes v. Nicholas*, S. Ct. Tex., Jan. 22, 1889.

Contingent remainders are given where the testator directed his estate to be divided into as many shares as he had children, and, as to the portions intended for his daughters, provided that a share be given to each, to be held by her in trust, receiving the income for her life, and, at her decease, to pay the same over to her children, or to their issue; in default of issue, the share to be held in trust, to be paid to testator's surviving children, or to the issue of such children as should be deceased. *Reiff's Appeal*, S. Ct. Pa., Feb. 4, 1889.

Devise of land to son in fee, followed by a provision that, if the devisee "should depart this life without leaving lawful issue to survive him," then "said property as would have fallen to my deceased son" shall vest in another son, contemplates death in the life-time of the testator, and, upon the first taker's surviving the testator, he takes an absolute fee. *Stevenson v. Fox*, S. Ct. Pa., April 22, 1889.

Fee-simple is given by a devise of land to testator's daughter, with the restriction that she shall not "have power to sell, but may leave the same to her children." *McIntyre v. McIntyre*, S. Ct. Pa., Jan. 7, 1889.

Probate in one State of a will devising land in another, is not binding upon the courts of the latter State as an adjudication of the validity or effect of such devise. *Keith v. Johnson*, S. Ct. Mo., Feb. 4, 1889.

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MATTERS REQUIRING JUDICIAL NOTICE.

(Continued.)

IX.

Customs, when so general in character as to be universally known, will receive judicial notice.

Of these may be noted,—That the running, directing and management of trains are generally controlled by the owners of a railroad: *South. & North. Ala. R. R. Co. v. Pilgreen* (1878), 62 Ala. 305; *Evansville, &c., R. R. Co. v. Smith* (1878), 65 Ind. 92. That mercantile agencies collect and distribute information as to the financial condition of persons in business: *Holmes v. Harrington* (1886), 20 Mo. App. 661. That Sundays and great festivals, such as Christmas, are *dies non* in law; and the commercial usage to observe them; so that, if a note falls due on one of them, it should be presented for payment or protest on the day previous thereto: *Sasscer v. Farmer's Bank* (1853), 4 Md. 409. The custom of the road, in passing to the right or left: *Turley v. Thomas* (1837), 8 C. & P. 103. The customs of the sea, to be observed by vessels, when such customs are general and notorious: *The Scotia* (1871), 14 Wall. (81 U. S.) 170. The initials C. O. D., affixed to packages sent by common carriers, may be taken notice of, as meaning to collect the price of the goods and charges for carrying them, on delivery: *State v. Intoxicating Liquors* (1882), 73 Me. 278; compare *McNichol v. Pacific Ex. Co.* (1882), 12 Mo. App. 401. Established weights and measures: *Mays v. Jennings* (1843), 4 Humph. (Tenn.) 102.

X.

As a general rule, customs local in their character, will not be judicially noticed. Of these may be mentioned,—The customs of mining camps for the use of water for mining purposes, under the provisions of the United States statute giving preference to prior occupants: *Lewis v. McClure* (1880), 8 Or. 273. The usages and customs of a particular denomination of Christians, as the Methodist Episcopal Church: *Youngs v. Ransom* (1859), 31 Barb. (N. Y.) 49. Where a white man married a Choctaw woman and took up his abode with that nation, whether or not he would, by law, be the head of a family, was held to depend upon the local customs of the tribe, and could not be judicially noticed: *Turner v. Fish* (1854), 28 Miss. 306. So of local customs for the use of water for irrigation: *Sullivan v. Hense* (1874), 2 Colo. 424. The rules of a board of brokers, where they do not constitute a usage of trade, independent of the action of the board in adopting them, will not receive notice: *Goldsmith v. Sawyer* (1873), 46 Cal. 209; *Sarahass v. Armstrong* (1876), 16 Kan. 192. It has been held, that a usage of merchants, by which they sold goods to each other's clerks and customers and charged the same, on credit, to the firm, would be judicially noticed as an established custom: *Cameron v. Blackman* (1878), 39 Mich. 108.

XI.

Unless specially required by law, courts will not take judicial notice of private or special statutes: *Workingmen's Bank v. Converse* (1881), 33 La. An. 963. In Kentucky, where, by statute, they are not required to be pleaded, private and special acts receive judicial notice: *Halbert v. Skyles* (1818), 1 A. K. Marsh. (Ky.) 368; *Collier v. Baptist Ed. Soc.* (1847–8), 8 B. Mon. (Ky.) 68. Under like circumstances, the same rule prevails in Virginia: *Somerville v. Wimbish* (1850), 7 Grat. (Va.) 205. In Alabama, where a similar provision exists, the courts have refused to notice a private act for the purpose of determining the sufficiency of a demurrer to the complaint, referring to the act by date and title only: *Broad Street Hotel Co. v. Weaver's Adm'rs* (1876), 57 Ala. 26.

XII.

Courts of general jurisdiction do not judicially notice municipal ordinances: *Garvin v. Wells* (1859), 8 Iowa 286. They will take such notice of the charter, and the power under it, to make by-laws, but not of those laws themselves: *Case v. Mayor of Mobile* (1857), 30 Ala. 538. Where the charter provides that the printed ordinances shall be received in evidence in all courts and places, they will not be judicially noticed, unless so introduced to the knowledge of the court: *Cox v. City of St. Louis* (1848), 11 Mo. 431. In all cases they are required to be pleaded in whole or in substance: *Mooney v. Kennell* (1854), 19 Mo. 551; *State ex rel Oddle v. Sherman* (1868), 42 Id. 214; *Lucker v. Commonwealth* (1868), 4 Bush (Ky.), 440. The ordinances of a municipality will be judicially noticed by its own courts; and where a conviction for a violation of an ordinance is had, and an appeal taken, the district court should take judicial notice of the ordinance. But it is not error to admit it in evidence, over the objection of the defendant: *Downing v. City of Miltonvale* (1887), 36 Kan. 740.

XIII.

Courts take judicial notice of the prominent geographical facts and features of the country; as its large lakes, rivers and mountains: *Mossman v. Forrest* (1866), 27 Ind. 233; *Winnipeg Lake Co. v. Young* (1860), 40 N. H. 420. The Supreme Court of Indiana takes notice of the falls in the Ohio river, and that no pilots are appointed for any other falls in the State: *Cash v. Auditor of Clark County* (1855), 7 Ind. 227. Notice will be taken that the State of Missouri is east of the Rocky Mountains: *Price v. Page* (1856), 24 Mo. 65. Courts will know that there are no tidal streams in an inland county: *Walker v. Allen* (1882), 72 Ala. 456. The Supreme Court of Wisconsin takes notice that the capacity of many small navigable streams in the State has been increased for lumbering purposes by a system of dams to retain and discharge the water: *Tewksbury v. Schulenberg* (1877), 41 Wis. 584.

In admiralty it has been held that the court would take judicial notice of the situation of a town upon a river, in a for-

eign country, and that a bar exists at its mouth, over which vessels of the draft of the one in suit cannot pass: *The Peterhoff* (1863), Bl. Pr. Cas. (U. S. D. Ct.) 463.

XIV.

Courts will take judicial notice of the boundaries of a State, and of the extent of its territorial jurisdiction; and also of its civil divisions, created by public laws, such as counties and towns: *Goodwin v. Appleton* (1843), 22 Me. 453; *Gilbert v. Moline Water Power Co.* (1865), 19 Iowa, 319. Where a question of title had been tried, regardless of the fact that the land in controversy was within an Indian reservation, the court, on the ground of public policy, took judicial notice of this fact, and held that there was a mistrial, notwithstanding a stipulation of the parties: *French v. Lancaster* (1880), 2 Dak. 346.

Where the declaration, in an action for personal injuries against a railroad company, alleged that the injury occurred in the county where the suit was brought, and the proof showed it to have been on the line between two post-offices in the county, the court took judicial notice that the locality shown was within the county: *Central R. R. &c. Co. v. Gamble* (1886), 77 Ga. 584. That lands are within a certain county will be noticed from the numbers of the township and range appearing in their description: *Fogg v. Holcomb* (1884), 64 Iowa 621. The court will judicially know that a certain judicial district is within and for a certain county, although it comprises only a portion of the territory of that county: *People v. Robinson* (1861), 17 Cal. 363. The Supreme Court of Alabama took judicial notice that all lands for sale in the district of Cahaba are within the State; and that a description of lands in a petition stating the section, town and range in said district was sufficient: *King v. Kent* (1857), 29 Ala. 542. In a suit against a railroad company for personal damages the proof was that the accident occurred at a certain locality, without showing the same to be within the county; the court took judicial notice of the county boundaries and that the place designated was within their limits, and the proof was held sufficient: *Indianapolis, &c., R. R. Co. v. Case* (1860), 15 Ind.

42. The Supreme Court of the United States takes judicial notice that, for internal revenue purposes, the United States is by law divided into collection districts, with defined geographical boundaries: *U. S. v. Jackson* (1881), 104 U. S. 41.

The Supreme Court of California has taken judicial notice of the relation of the streets in San Francisco to one another and of the direction in which they run: *Brady v. Page* (1881), 59 Cal. 52. And so, in Texas, that a town is situated in a county of which it is the county seat: *Carson v. Dalton* (1883), 59 Tex. 500.

XV.

Courts will take judicial notice of the Government surveys and legal subdivisions of the public lands: *Atwater v. Schenck* (1859), 9 Wis. 160; *Hill v. Bacon* (1867), 43 Ill. 477; *Prieger v. Exchange, &c., Ins. Co.* (1857), 6 Wis. 89. And of other public surveys made by the Government: *Wright v. Phillips* (1849), 2 G. Gr. (Iowa) 191. The courts of Illinois take notice of the meaning of initials used in the description of land in conveyances, levies of executions, judicial sales, surveys, assessments for taxes, &c., without further proof; where, in the description of land, the number of a township is given, without indicating whether north or south, in the county where the land is described as being, the court will take judicial notice of the fact that the township referred to is north; and that the south line of the section and the south line of the township are one and the same: *Kile v. Town of Yellowhead* (1875), 80 Ill. 208. Surveys of blocks and lots in towns and cities will also be noticed: *Gardner v. Eberhart* (1876), 82 Ill. 316. That the State of Oregon is a Congressional and judicial district of the United States: *U. S. v. Johnson* (1873), 2 Saw. (U. S. C. Ct., D. Or.) 482. Of the area of any established county in the State: *Board of Com'rs v. Spiller* (1859), 13 Ind. 235; *Buckinghouse v. Gregg* (1862), 19 Id. 401; *Wright v. Hawkins*, 28 Tex. 452. Also, of where the lines of counties run and the towns embraced therein; *Ham v. Ham* (1855), 39 Me. 263; *Brown v. Elms* (1849), 10 Humph. (Tenn.), 135.

Courts will take judicial notice of the intended area of a government quarter section of land, and where it was claimed

that a fractional quarter contained a larger area it was held that proof must be made that the lines were so run on the ground as to include the increased area: *Quinn v. Windmiller* (1885), 67 Cal. 461. In North Carolina the Supreme Court will take judicial notice of the judicial districts of the State, and what counties each embraces, and, where the judges of the Superior Courts are, in the course of their ridings and in the discharge of their official duties: *State v. Ray* (1887), 97 N. C. 510.

XVI.

Judicial notice will be taken of the distance between well-known cities of the United States and the ordinary speed of railway trains between the same: *Pearce v. Langfit* (1882), 101 Pa. 507; *Rice v. Montgomery* (1866), 4 Biss (U. S. C. Ct., D. Ind.) 75.

Where a territorial statute provided that acts should take effect at the seat of government on their passage, and allowing one day for each fifteen miles distant therefrom, on the question as to whether a certain act was in force at a given locality on a particular day, the court took judicial notice of the distance of the place named from the seat of government: *Hoyt v. Russell* (1885), 117 U. S. 401.

Judicial notice will be taken of the geographical positions of the towns in a county: *Indianapolis, &c., R. R. Co. v. Stephens* (1867), 28 Ind. 429; *State v. Tootle* (1837), 2 Harr. (Del.) 541. And of the county in which a town created by law is situated: *Martin v. Martin* (1863), 51 Me. 366; *Vanderwerker v. People* (1830), 5 Wend. (N. Y.) 530. That the State and the government township are two distinct organizations: *La Grange v. Chapman* (1863), 11 Mich. 499. Of the fact that there is but one township of a given description in a county of the State: *Stoddard v. Sloan* (1885), 65 Iowa 680. And of the fact that Galveston is in a county of the same name: *Solyer v. Romanct* (1880), 52 Tex. 562.

XVII.

Courts are bound to take judicial notice of public history affecting the whole people: *Payne v. Treadwell* (1860), 16 Cal.

220. That slavery was destroyed by act of war, prior to the passage of the State ordinance to that effect, approved on the 22nd day of September, 1865, is judicially noticed by the Supreme Court of Alabama: *Ferdinand v. State* (1866), 39 Ala. 706. The separation of the Methodist Episcopal Church in 1844 into two Methodist Episcopal Churches, the one north and the other south of a common boundary line, was an event that connected itself with and formed a part of the history of the country, of which judicial notice will be taken: *Humphrey v. Burnside* (1868), 4 Bush (Ky.) 215. Courts will take judicial cognizance that the civil war was terminated prior to June 1st, 1865; and, in Alabama, it will be judicially noticed that the United States mails were established between Huntsville and New Orleans prior to December 18, 1865: *Turner v. Patton* (1873), 49 Ala. 406.

XVIII.

The court will take judicial notice that certain portions of a State in insurrection were under the control of the forces of the United States, but will not infer therefrom that individuals resided there or in the territory over which the government had re-established its authority as against the averments of a plea that they were public enemies: *Rice v. Shook* (1871), 27 Ark. 137. The courts of Tennessee will take notice of when the courts in a particular county were closed, civil law suspended and military law prevailing, in the civil war: *Killebrew v. Murphy* (1871), 3 Heisk. (Tenn.) 546. The courts of Texas take notice that in 1869 the government of that State was administered by military authority, under the reconstruction acts of Congress; and that the orders of the commander of the 5th military district had the force of law: *Gates v. Johnson County* (1871-2), 36 Tex. 144. The courts take notice that the Confederate currency was imposed only by force, and that its dollars were of different value from those of the United States: *Keppel v. Petersburg R. R. Co.* (1868), Chase (U. S. C. Ct., D. Va.) 167. The Alabama courts take cognizance of the fact, as a matter of the history of the times, that the people of that State, in 1867, were in a condition of very

great pecuniary depression, as affecting the duties of a guardian, at that time, in making investment of trust funds: *Ashley v. Martin* (1874), 50 Ala. 537. The result of an election for the removal of a county seat, when the matter is drawn in issue collaterally, will be judicially noticed: *Andrews v. Knox County* (1873), 70 Ill. 65. The courts will take notice of the different classes of notes and bills in circulation as money at a particular time: *Hart v. State* (1877), 55 Ind. 591. The general facts connected with the issuing, use, and depreciation of the Confederate currency, will be taken notice of as matters of general history: *Simmons v. Trumbo* (1876), 9 W. Va. 358. The courts of the State will know who is the Executive, at any time when the fact may be called in question: *Deweese v. Colorado County* (1870), 32 Tex. 570. And that gold coin in 1868 did not circulate as money: *U. S. v. American Gold Coin* (1868), 1 Wool. (U. S. C. Ct., D. Mo.) 217. The Alabama courts will notice that, as a general thing, contracts made in that State, in 1865, were made with reference to Confederate currency: *Buford v. Tucker* (1870), 44 Ala. 89. The courts of Indiana are bound to notice that, during and since the civil war, the Adjutant-General of that State has made muster rolls of her regiments in the service, and that a certified copy of the same is sufficient evidence to prove the enlistment, etc., of a party as a volunteer, in an action by him to recover bounty; and that the certificate is sufficient, if made by the present incumbent of the office: *Monroe County Com'rs v. May* (1879), 67 Ind. 562. Transactions and objects which necessarily connect themselves with the history of a country will be judicially noticed: *Hart v. Bodley* (1807), Hardin (Ky.) 516.

The fact that the United States was the proprietor of, and made a grant of land to the State of Illinois, and the location of such land, is judicially noticed by the courts of the State: *Smith v. Stevens* (1876), 82 Ill. 554. Fremont's public career in California, in 1846 and 1847, is taken notice of as a matter of history, affecting the people and the government; an interesting sketch of which, showing its legal aspects, is given in the text of the following decision: *De Celis v. United States* (1877), 13 Ct. Cl. (U. S.) 117. Courts will notice such a

public event as Sherman's march to the sea: *Williams v. State* (1881), 67 Ga. 260. And the results of a taking of the census: *People v. Williams* (1883), 64 Cal. 87. The courts of Tennessee take judicial notice of the suspension of the statute of limitations in that State, from May 6th, 1861, to January 1st, 1867: *East Tenn. Iron Manuf'ng Co. v. Gaskell* (1879), 2 Lea. (Tenn.) 742.

XIX.

Courts will take judicial notice of the history of their State, and its topography and condition: *Williams v. State* (1878), 64 Ind. 553. The Supreme Court of Alabama takes judicial notice, as a matter of history in the State, that the evil sought to be remedied by a certain law was to prevent County Treasurers from speculating in State warrants; and that the constitutional provision, "No money shall be drawn from the treasury but in pursuance of an appropriation made by law," was to prevent the executive power from controlling the public moneys and not to restrict the legislative power: *Smith v. Speed* (1874), 50 Ala. 276.

The claim of Virginia, before the year 1783, to the Northwest Territory; her cession of it, in that year, to the United States, reserving a tract of land granted by her to the soldiers of the Illinois regiment, and her statutes for the final disposal of the soil of this reservation, now known as the "Illinois Grant," are taken notice of by the courts of Indiana, as part of the history of the State: *Henthorn v. Doe on dem. of Shepherd* (1822), 1 Blackf. (Ind.) 159. The history of a county, as to the times of holding courts and as to the seat of justice, will be noticed: *Ross v. Austill* (1852), 2 Cal. 183. The courts of Alabama take notice that all the lands in a certain county in the State are held under title from the United States: *Lewis v. Harris* (1858), 31 Ala. 689. In order to regulate the fees of the Clerk of the Circuit Court, by determining which class the county falls within, under the Constitution, the Supreme Court will take judicial notice of the population of the county by the last census: *Worcester Bank v. Cheeney* (1880), 94 Ill. 430. Finally, the Supreme Court of California broadly states the rule that, "Every judge is bound to know the history and the

leading traits which enter into the history of the country over which he presides." The court takes judicial notice of all the leading features and peculiar facts in the history of the State ; its physical development and social condition, mainly growing out of the fact that the United States Government has parted with comparatively a small portion of the soil by sale to individuals ; that, in consequence, the mining regions have become public domain, the usages in regard to which have assumed the character of matters of notoriety and history, to be regarded by the courts as having in many instances the force of positive law : *Conger v. Weaver* (1856), 6 Cal. 548.

XX.

All courts of general jurisdiction take judicial notice of the day of holding general elections, and of the officers to be elected, under the Constitution and laws of their respective States : *State v. Minnick* (1863), 15 Iowa 123 ; and of the recurrence of the day on which the general election is held : *Himmelman v. Hoadley* (1872), 44 Cal. 213. And of the accession of a new governor : *Hizer v. State* (1859), 12 Ind. 330 ; and of the civil officers of the county where such courts hold their sittings : *Dyer v. Flint* (1859), 21 Ill. 80 ; *Scott v. Jackson* (1857), 12 La. An. 640 ; *Thielman v. Burg* (1874), 73 Ill. 293 ; and of who are their own officers, but not those of other courts : *Norvell v. McHenry* (1849), 1 Mich. 227. It has been held that, on the ground of general notoriety, the official character of mustering officers, during the civil war, should be recognized at least presumptively : *Chapman, &c., v. Herrold* (1868), 58 Pa. 106.

Courts take judicial notice of accession of persons to, and holding of, offices under the Constitution ; and while remaining in office and exercising official duties, they are regarded by the courts as officers *de facto* : *State ex rel. Knowlton v. Williams* (1856), 5 Wis. 308. Where the court has appointed a sheriff, it will be presumed to have acted upon judicial knowledge of the vacancy. *Doe on dem. of Saltonstall v. Rilcy* (1856), 28 Ala. 164.

The Supreme Court of the United States takes judicial notice of the persons who, from time to time, preside over the patent office, whether permanently or temporarily, and the production of their commissions is not necessary to support their official acts: *York, &c., R. R. Co. v. Winans* (1854), 17 How. (58 U. S.) 30.

Courts take notice of the election or appointment of sheriffs, as well as other administrative officers, and will treat them as officers *de facto*, when the validity of their acts is collaterally called in question: *Thompson v. Haskell* (1859), 21 Ill. 215; *Alexander v. Burnham* (1864), 8 Wis. 199. So of the sheriffs of the several counties: *Ingram v. State* (1855), 27 Ala. 17; the time at which a sheriff's office expired: *Ragland v. Wynn* (1860), 37 Ala. 32; that a tax collector, duly appointed, is a sheriff under a certain statute: *Burnett v. Henderson* (1858), 21 Tex. 588. For the purpose of sustaining the authenticity of a certificate of acknowledgment of a power of attorney, notice has been taken, that, under the Constitution of another State, a county clerk is, *ex officio*, clerk of a court of record: *Morse v. Hewitt* (1874), 28 Mich. 481. Courts in Louisiana take notice of military orders during the civil war, which affected the proceedings of courts in portions of that State: *Lanfear v. Mcstier* (1866), 18 La. An. 497; *Taylor v. Graham* (1866), 18 Id. 656; *New Orleans Canal, &c., Co. v. Templeton* (1868), 20 Id. 141. Cognizance will be taken, that under the constitution and laws of a State, the terms of all justices of the peace terminate on a certain day: *Stubbs v. State* (1876), 53 Miss. 437; and in Indiana, of the legal times for the Boards of County Commissioners to hold their sessions: *Collins v. State* (1877), 58 Ind. 5; and that, by law, the trustee of the civil, is also trustee of the school township: *Inglis v. State* (1878), 61 Ind. 212. Courts will know who are their own officers, and supply the word "clerk," when omitted in a jurat: *Dyer v. Last* (1869), 51 Ill. 179; and that a certain person is clerk, and that it is his endorsement of the date of filing on a complaint: *Yell v. Lane* (1883), 41 Ark. 53; *Hammann v. Mink* (1884), 99 Ind. 279. Notice will also be taken of the term of office of a notary public, during which time he has authority to issue warrants:

Carey v. State (1884), 76 Ala. 78. Where it appears to the court, that by law in another State, a notary has authority to do the act in question, his certificate and seal will be judicially noticed: *Denmead v. Maack* (1876), 2 MacAr. (D. C.) 475.

XXI.

A certificate endorsed on a county treasurer's bond, by the Deputy Auditor General, will be recognized as the act of a State officer: *People v. Johr* (1871), 22 Mich. 461. Where its clerk signed a jurat as C. P. C. C., the court noticed the meaning of these initials to be "Clerk Porter Circuit Court:" *Buell v. State* (1880), 72 Ind. 523. Notice will be taken that a notary public, who signs a jurat to an affidavit, holds his office within and for the county where the same was made: *Stoddard v. Sloan* (1885), 65 Iowa 680. Courts will take judicial notice of who fill the county offices within their jurisdiction, and the genuineness of their signatures; hence, it is not necessary to prove that one who made a tax deed, was tax collector at the time the sale was made: *Wetherbee v. Dunn* (1867), 32 Cal. 106; *Templeton v. Morgan* (1862), 16 La. An. 438.

E. W. METCALFE.

(To be continued.)

STATUTES RELATING TO TELEPHONES.

(Continued.)

Louisiana has amended Section 696 of her Revised Statutes, by an Act approved April 10, 1880 (Laws, page 168), and in force from that date, as follows—

SECTION 696. Corporations chartered or formed, under the laws of this or of any other State, or under the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence, the equivalent thereof which may be hereafter invented or discovered, may construct [and] maintain such telegraph, telephone, or other lines necessary to transmit intelligence along all State, parish, or public roads or public works, and along and parallel to any of the railroads in the State, and along and over the waters of this State; *provided*, that the ordinary use of such roads, works, railroads and waters be not thereby obstructed; and along the streets of any city, with the consent of the council or trustees thereof; and such companies shall be entitled to the right of way over all lands belonging to the State, and over the lands, privileges and servitudes of other persons and corporations; and the right to erect poles, piers, abutments and other works necessary for constructing, working, operating and maintaining their lines and works, upon making just compensation therefor. That in the event such company shall fail, on application therefor, to secure such right by consent, contract or agreement upon just and reasonable terms, then such companies or corporations shall have the right to proceed to expropriate the same, as provided in and by the laws of the State relative to expropriation of lands for railroads and other works of public utility; and shall so construct their works as not to impede or obstruct the full use of the highways, navigable waters, or the drainage or natural servitudes of the land over which the right of way may be exercised. But no company operating under the provisions of this act shall have the power to contract with the owners of land or with any other corporation, for the right to erect and maintain any telephone, telegraph or other line for the speedy transmission of intelligence over his or its lands, privileges or servitudes, to the exclusion of the lines of other companies operating under the provisions of this act.

• New York provides against prescription from attachment of wires, by chap. 40, Laws 1886, Rev. Stat. 8th ed., p. 2412—

An act relating to telegraph, telephone, electric light and other wires and cables.

SECTION 1. Whenever any wire or cable, used for any telegraph, telephone, electric light or other electric purposes or for the purpose of communication otherwise than by the aid of electricity, is or shall be attached to, or does, or shall extend upon or over any building or land, no lapse of time whatever shall raise a presumption of any grant of, or justify a prescription of any perpetual right to such attachment or extension.

The taxation of telephone companies is provided for by the Laws of 1886, chap. 659, Rev. Stat., 8th ed., p. 2066—

An act to provide for the assessment of telegraph, telephone and electric light lines.

SECTION 1. The portion of any telegraph, telephone or electric light line in any town or ward in this State, shall be assessed in such town or ward, to the owner or person or corporation, or association in control thereof, in the manner provided by law for the assessment of lands of resident owners, and the same proceedings may be had upon such assessment, and for the collection of any tax levied thereon.

SEC. 2. The word "lines" shall include the interest in the land on which the poles stand, the right or license to erect such poles on land, all poles, arms, insulators, wires and apparatus, instruments, or other thing connected with or used as a part of such line, in such town or ward, and belonging either to the owner of such line, or the person, corporation, or association in control thereof.

SEC. 3. In enforcing the collection of any tax levied upon such assessment, the instruments and batteries connected with such line may be included among the articles subject to levy and sale, and in case there is not sufficient personal property, together with such instruments and batteries, to pay such tax and the percentage thereon of the collector, the collector shall return all sums remaining unpaid, to the county treasurer, and in the city and county of New York, the receiver of taxes, as other unpaid taxes are returned; and the said county treasurer and receiver of taxes shall proceed to sell such part of the line, in the town or ward where the tax was levied, as is necessary to satisfy the unpaid tax and percentage, in the manner now provided by law for the sale of land on execution; and upon such sale, shall execute to the purchaser a conveyance of such part of said line, and the purchaser shall thereupon become the owner thereof.

SEC. 4. It shall be the duty of the clerk of the board of supervisors of the several counties of this State, within five days after making out or issuing of the annual tax warrants by the board of supervisors of their respective counties, to prepare and deliver to the county treasurer, and in the city and county of New York, the receiver of taxes, a statement, showing the title of all telegraph, telephone, and electric light lines in such county as appear in the last assessment-roll of the town or ward in such county, the valuation of the property, real and personal, of such line, in each town or ward, and the amount of tax assessed or levied on such valuation in each town or ward in the county.

SEC. 5. Any telegraph, telephone, or electric light company assessed, may, within thirty days after the receipt of such notice by the county treasurer, or receiver of taxes, pay the amount of tax so assessed, or levied, on their property, with one per cent. fees on the tax, to the county treasurer, or receiver of taxes, who is hereby authorized and directed to receive such amounts; to give a proper receipt therefor; and credit the same to the collector of the town or ward in which the tax was levied. In case the tax on any telegraph, telephone, or electric light line remains unpaid at the expiration of the thirty days specified, it shall be the duty of the county treasurer, and receiver of taxes, to notify the collector of such town or ward of such failure to pay said tax, and said collector shall proceed to collect such tax in the manner herein provided. The tax may be paid directly to the collector, at any time during the life of his warrant, but no collector shall proceed to enforce his warrant, and collect such tax, until the receipt of such notice of non-payment from the county treasurer, or receiver of taxes.

SEC. 6. Nothing herein contained shall be construed to prevent the collection of taxes by any proceeding now provided for by law.

The valuation for school taxes is apportioned amongst the different local political divisions, by chap. 694, Laws of 1867 (Rev. Stat., 8th ed., page 1326), entitled—

An act in relation to the valuation of the property of railroad companies in school districts, for the purposes of taxation.

SECTION 1. It shall be the duty of the town assessors, within fifteen days after the completion of their annual assessment list, to apportion the valuation of the property of each and every railroad, telegraph, telephone, and pipe-line company, as appears on such assessment list, among the several school districts in their town, in which any portion of said property is situated, giving to each of said districts their proper portion, according to the proportion that the value of said property in each of such districts bears to the value of the whole thereof in said town. (*Thus amended by L. 1884, ch. 414.*)

SEC. 2. Such apportionment shall be in writing, and shall be signed by said assessors, or a majority of them, and shall set forth the number of each district, and the amount of the valuation of the property of each railroad, telegraph, telephone, and pipe-line companies, apportioned to each of said districts; and such apportionment shall be filed with the town clerk, by said assessors or one of them, within five days after being made; and the amount so apportioned to each district shall be the valuation of the property of each of said companies, on which all taxes against said companies in and for said districts, shall be levied and assessed, until the next annual assessment and apportionment. (*Thus amended by L. 1884, ch. 414.*)

SEC. 3. In case the assessors shall neglect to make such apportionment, it shall be the duty of the supervisor of the town, on the application of the trustees or board of education of any district, or of any railroad, telegraph, telephone, or pipe-line company, to make such apportionment, in the same manner and with the like effect as if made by said assessors. (*Thus amended by L. 1885, ch. 340.*)

SEC. 4. The town clerk shall, whenever requested, furnish to the trustees or board of education of each district, a certified statement of the amounts apportioned to such district, and the name of the company to which the same relates.

SEC. 5. In case any alteration shall be made in any school district, affecting the property of any railroad, telegraph, telephone, or pipe-line company, the officer making such alteration shall, at the same time, determine what change in the valuation of the said property in such district would be just, on account of the alteration of district, and the valuation shall be accordingly changed. (*Thus amended by L. 1885, ch. 340.*)

Ohio provides for the wages of employes, by an amendatory act, in effect from July 1, 1888, Laws, page 251—

SEC. 1. That every incorporated manufacturing, mining, mercantile, street railroad, telegraph, telephone, express, and water company, and construction companies, or contractors building railroads, shall pay, in lawful money, or by check, draft, or order, payable in lawful money, at sight or on demand, on a bank located at a distance not greater than eight miles from the place where said labor was

performed, twice in each month, each and every employe engaged in its business, the wages earned by such employe to within ten days of the date of said payment; provided, however, that if at any time of payment, any employe shall be absent from his regular place of labor, he shall be entitled to said payment at any time thereafter, during their regular business hours, upon demand; and provided, further, that said employer may retain at each payment, any amount said employe may order withheld from his or her wages for rent, powder, tools, tool sharpening, or oil, due said employer.

SEC. 2. Any corporation mentioned in section one of this act, violating any of the provisions of this act, shall be punished by a fine not exceeding one hundred and not less than fifty dollars; provided, complaint for such violation is made within thirty days from the date thereof. Providing [*sic*], that in pursuance of and under this act, there shall not be more than one conviction of the same corporation during any two weeks.

The energy of employes is restrained by an act, in effect from April 29, 1885, Laws, page 166, entitled—

AN ACT to prevent trespass by the employes of telegraph companies, and other persons, and prescribing the penalty therefor.

SEC. 1. *Be it enacted, etc.*, That any person engaged either for himself, or as an officer, clerk, agent, servant, or other employe of any corporation, firm, or person, doing business wholly or partly in the State of Ohio, as receivers and transmitters of messages or other communications, either by telegraph, telephone, or other similar means, or of any electric light, district telegraph, or other company, person, firm, or corporation, who shall enter into or upon the premises, building or buildings of another, for the purpose of constructing, altering, repairing, or examining the wires, poles, insulators, frames, or other appendages, belonging to such corporation, company, firm, or person, without the written consent of the owner or agent of such premises, building or buildings, or shall attach thereto any wire, pole, insulator, frame, or other appendage whatsoever, without such consent, shall be fined not less than ten nor more than one hundred dollars. (See, also, §3457 of the Rev. Stat. *infra*.)

The general provisions of chapter 4, title II, of the Revised Statutes of Ohio, relating to Magnetic Telegraph Companies (3rd ed. pp. 706–9, and Supp. of 1884, pp. 173, 4), have been extended to telephone companies, as noted below, and are—

SEC. 3454. A magnetic telegraph company, heretofore or hereafter created, may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but the same shall not incommode the public in the use of such road.

SEC. 3455. Any such company may construct, own, use, and maintain any line or lines of magnetic telegraph, whether described in its original articles of incorporation or not, and whether such line or lines are wholly within or part'y beyond the limits of this State, and may join with any other company or association in conducting, leasing, owning, using, or maintaining such line or lines, upon such

terms as may be agreed upon between the directors or managers of the respective companies; and such companies may own and hold any interest in any such line or lines, or may become lessees of such line or lines, upon such terms as may be agreed upon; but it shall be unlawful for any such company or companies, and the owner or owners of rights of way, to contract for the exclusive use thereof for telegraphic purposes. (*So amended by act of April 15, 1880; Laws, vol. 77, page 264.*)

SEC. 3456. Any such company may enter upon any land, whether held by an individual or a corporation, and whether acquired by purchase or appropriation, or in virtue of any provision in its charter, for the purpose of making preliminary examinations and surveys, with a view to the location and erection of lines of magnetic telegraph, and may appropriate so much thereof as may be deemed necessary for the erection and maintenance of its telegraph poles, piers, abutments, wires, and other necessary fixtures, and for stations, and the right of way over such lands, and adjacent lands, sufficient to enable it to construct and repair its lines.

SEC. 3457. No such company shall, without the consent of the owner thereof, in writing, enter a building or edifice, or use or appropriate any part thereof, or erect any telegraph pole, pier, or abutment in any yard or enclosure within which an edifice is situate, nor, in cases not provided for in section three thousand four hundred and sixty-one, erect any telegraph pole, pier, abutment, wires, or other fixtures, so near to any edifice as to occasion injury thereto, or risk of injury, in case such pole, pier, or abutment be overthrown, nor injure or destroy any fruit or ornamental tree. (See, also, the act of 1885, against trespass, *supra*; it does not contain a repealing clause.)

SEC. 3458. When lands sought to be appropriated for lines of magnetic telegraph, are held by a corporation incorporated under any law of this State, whether held by purchase, or in virtue of any appropriation authorized by its charter, or by any law of this State, the right of the company to appropriate such lands shall be limited to such use of the same as shall not, in any material degree, interfere with the practical uses to which the company is authorized to put such lands, under its charter; and no such company shall erect poles, piers, abutments, wires, or other necessary fixtures, in such close proximity to any other line of magnetic telegraph, authorized by law to be constructed, as to interfere mechanically with the practical working of such telegraph.

SEC. 3459. The right of such company to use lands held by a railroad company, for the permanent structures of such telegraph, shall be limited to the land which lies within five feet of the outer limits of the right of way of the railroad company, where it is practicable to erect the line within those limits; when the company seeks to appropriate lands that lie beyond those limits, its petition must set forth the facts, showing that it is impracticable to erect such line within said limits, and designate, either by a survey and map, or by reference to monuments, or by other means of easy identification, the place or places where the company seeks to establish the line; the probate court shall, in all instances, determine, if it be controverted by the railroad company, whether the erection of the line, at the place, or places, designated, will, in any material degree, interfere with the practical uses to which such railroad company is authorized to put such land, and if the court is satisfied that it will so interfere, it shall reject the petition, or require the structure to be erected at such other place, or places, as the court shall direct; but

nothing in this chapter shall be so construed as to authorize any company to appropriate the use of the track or rolling stock of any railroad company for the purpose of transporting poles, materials, or the employes of such telegraph company, or for any other purpose whatever.

SEC. 3460. Proceedings to appropriate lands to the use of a company against a defendant, whose adjoining or continuous lands lie in more than one county, may be instituted in any county in which any part of such lands lie, and the damages shall be assessed in one proceeding, in respect of all such lands of the defendant, sought to be appropriated, whether lying in the county wherein the court is sitting, or in other counties.

SEC. 3461. When any lands, authorized to be appropriated to the use of a company, are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village, and the company; and if they cannot agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness.

SEC. 3462. Every company, incorporated or unincorporated, operating a telegraph line in this State, shall receive dispatches from and for other telegraph lines, and from and for any individual; and on payment of its usual charges for transmitting dispatches, as established by the rules and regulations of the company, shall transmit the same with impartiality and good faith, under a penalty of one hundred dollars for each case of neglect, or refusal, so to do, to be recovered, with cost of suit, by civil action, in the name and for the benefit of the person or company sending, or forwarding, or desiring to send or forward, the dispatch. (*So amended by act of April 15, 1880; Laws, vol. 77, page 264.*)

SEC. 3463. When the person who sends the dispatch, desires to have it forwarded over the lines of other telegraph companies, whose termini are respectively within the limits of the usual delivery of such companies, to the place of final destination, and tenders to the first company the amount of the usual charges for the dispatch, to the place of final delivery, the company shall receive the same, and without delaying the dispatch, shall pay to the succeeding line the necessary charges for the remaining distance; and the succeeding line shall accept the same, and forward the dispatch in the same manner as if the sender had applied to it in person, and paid the usual charges, and, for the omission so to do it, shall be liable to a like penalty, as provided in the last section.

SEC. 3464. When application is made to any such company, to send a dispatch, the officer, agent, clerk, or servant, appointed by the company to receive dispatches at that station, shall inform the applicant, and, if required by him, write upon the dispatch, that the line is not in working order, or that dispatches on hand for transmission will occupy the time, so that the dispatch offered cannot be transmitted within the time required, if the facts are so; and for an omission so to do, or for intentionally giving false information to the applicant, in relation to the time

within which the dispatch offered may be sent, such officer, agent, clerk, or servant, and the company by which he is employed, shall incur the penalty provided in section *thirty-four hundred and sixty-two*.

SEC. 3465. Every telegraph company, incorporated or unincorporated, operating any telegraph line in this State, shall transmit and deliver all dispatches in the order in which they are received for transmission or delivery, under the like penalty of one hundred dollars, as provided in section *thirty-four hundred and sixty-two*; but arrangements may be made with the proprietors or publishers of newspapers, for the transmission, for the purpose of publication, of intelligence of general and public interest, out of its regular order, and dispatches by officers of the State, or the United States, on public business, may have preference over all private business, when the public interest requires such preference; no company shall be required to deliver dispatches at a greater distance from the station at which they are received than its published regulations require; and if an applicant direct a dispatch to be mailed to the place of delivery, and offer to pay the necessary postage thereon, the company shall affix the necessary postage stamp and mail the dispatch in time for the first mail that departs after such dispatch is received at the office of delivery, and for the omission so to do, the company shall be liable to a like penalty as provided in section *thirty-four hundred and sixty-two*.

SEC. 3466. Any person connected with a telegraph company, incorporated or unincorporated, operating a line of telegraph in this State, in any capacity, who wilfully divulges the contents or nature of the contents of a private communication, intrusted to him for transmission or delivery, or who wilfully refuses, or neglects, to transmit or deliver the same, or wilfully delays the transmission or delivery of the same, with a view to injure the sender, or intended receiver thereof, or to benefit himself, or any other person, shall be imprisoned in the county jail, not exceeding three months, or fined, not exceeding five hundred dollars, at the discretion of the court.

SEC. 3467. A person who knowingly transmits by telegraph line, any false communication or intelligence, with intent to injure any person, or to speculate in any article of merchandise, commerce or trade, or with intent that another may do so, or knowingly sends, or delivers, a dispatch that is forged, or not authorized by the person whose name purports to be signed thereto, shall be liable to the same penalty as is provided in section *thirty-four hundred and sixty-two*. [See, also, SECTION 7088, punishing the sender or publisher of a fraudulent telegram.]

SEC. 3468. If, at any time, after the erection of a line of magnetic telegraph upon lands held by a corporation, the corporation have occasion to use the land upon which a telegraph pole, pier, abutment, or other fixture has been erected, for any of the purposes authorized by its charter, the company shall remove such pole, pier, abutment or fixture, to such convenient place as may be designated by the corporation requiring the use of the ground, upon reasonable notice given in writing, and erect the same in such new place, so as not to interfere with the practical uses to which the corporation is authorized to put such land; and if it is impracticable to erect a line of magnetic telegraph upon the lands of such corporation, in consequence of the uses to which the corporation put the lands, the telegraph company may appropriate adjoining lands, by a separate proceeding for that purpose.

SEC. 3469. If, at any time after the erection of such telegraph line, on the

lands of a corporation, the corporation apprehend danger, or risk of danger, to its works or practical operations, in consequence of decay or defect in the mode of structure of any of the works of the telegraph company, it may require the company upon five days' notice, in writing, to repair such decayed or defective works; or, if the danger is imminent, so as not to admit of delay, the corporation may, without notice, repair the defect and recover the reasonable expense thereof, with costs of suit, before any court of competent jurisdiction.

SEC. 3470. Where two or more telegraph companies, whose several lines are not parallel, or in competition with each other, and when so united, will form a continuous line, for receiving and transmitting dispatches, desire to consolidate into a single corporation, they may do so in the manner and subject to the rules provided in chapter two, for the consolidation of railroad companies. [*So amended by act February 4, 1881, Laws, vol. 78, p. 26.*]

SEC. 3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies.

"An act to facilitate the construction of the electric telegraph" (in force February 8, 1847, Laws, vol. 45, page 34), was not embraced in the Revision of 1879, and is omitted here on account of the special wording of Section 3471, *supra*. It appears as Title xlix, §§ 1-6, pp. 768-9, vol. 3, Supp. Rev. Stat. Ohio, ed. of 1884, and authorized construction of telegraph lines, so as not to incommode the public; authorized county commissioners to appoint appraisers for damages from construction of lines; punished those who injured the lines, and reserved the right to alter, modify or repeal this act, as well as to tax stock of telegraph companies.

JOHN B. UHLE

(To be continued.)

RECENT AMERICAN DECISIONS.

Supreme Court of Tennessee.

BATES v. TAYLOR, GOVERNOR.

The Courts have no jurisdiction over the Chief Executive of a State, to compel or restrain the performance of any official duty, whether executive or ministerial.

B filed a bill in equity, to compel A, the Governor of the State, to deliver to complainant a certificate of election to membership in Congress, and to enjoin the issuance of one to another applicant. The Constitution of Tennessee required the Governor to perform certain duties, and such others as might be devolved upon him by statute. Among the latter provided by the Code, was that of issuing a commission to each person elected to Congress. Facts were alleged tending to show that B had been duly declared elected, and that A had signed and sealed a commission to B, but pending its delivery, had changed his mind, and was about to issue a commission to C, a contestant. On motion to dismiss, *held*, that the Court had no jurisdiction over the Governor to grant the relief prayed for.

APPEAL from Chancery Court of Davidson County.

A bill was filed in the Chancery Court at Nashville, Tennessee, by Creed F. Bates, complainant, against Robert L. Taylor, Governor of the State, to compel the latter to deliver a certificate of election to the complainant and to prevent the issuance of a certificate to H. Clay Evans, another applicant.

Complainant alleged in substance, that he was elected to membership in the Fifty-first Congress of the United States, in the Third Congressional District of Tennessee, on the sixth day of November, 1888; that the fact of his election was duly ascertained by the Governor and Secretary of State, who by law constituted a board to canvass the returns; that, thereupon, in further compliance with the law, a certificate, showing the fact of his election, was made out, signed by the Governor, attested by the Secretary of State, and sealed with the great seal of the State; that, after all this, the Governor refused to deliver said certificate to the complainant, and claimed that one H. Clay Evans was elected to said office and entitled to receive a certificate of election instead of complainant; and that the Governor was about to issue a certificate to said Evans, though the latter was not elected and the Secretary of State would not join the Governor in such certificate.

Complainant further alleged that when the said board acted, and the certificate reciting his election was signed, attested and sealed, the board's power was exhausted and complainant's rights became fixed and his title to the office complete; that the board could not subsequently reconsider its action and declare another person elected; that in no event had the Governor a right to reconsider the matter himself, and issue a certificate to Evans, without the concurrence of the Secretary of State; that the issuance of a certificate to Evans would, in view of foregoing facts, be a usurpation of authority on the part of the Governor to the great and irreparable injury of complainant.

The prayer of the bill was that the Governor be enjoined from issuing a certificate to Evans, and that he be compelled to deliver the one already signed, attested and sealed to complainant.

The Governor appeared by counsel and moved the Court to dismiss the bill—

1. For want of equity on the face of the bill.
2. For want of jurisdiction in the Court.
3. Because it is unfit for a court of equity.

The Chancellor sustained the motion and dismissed the bill. Complainant appealed.

Vertrees & Vertrees, Hill & Grassbery and Marks & Marks, for complainant.

A. S. Colyar, Demoss & Moline and S. Watson, for respondent.

CALDWELL, J., Feb. 16, 1889, (after stating the foregoing facts): The main question debated at the bar, and that which is conclusive of the case, is one of jurisdiction.

The Constitution ordains that the Governor of the State shall perform certain duties therein prescribed, and such others as may from time to time be devolved upon him by act of the Legislature—Art. III. Among the duties so devolved upon him by statute is that of issuing a commission or certificate of election to each person elected representative to Congress. Code (M. and V.) sections 1094 and 1146. The issuance of

such commission or certificate, whether called a ministerial or an executive duty, is an official action, whose performance can be neither coerced nor restrained by the courts.

An attempt on the part of the courts to control his action under the statute would be an invasion by one department of the Government of the rights of another department, and, for that reason, a violation of sections 1 and 2 of Article II of the Constitution, which are in the following language :

“Sec. 1. The powers of the Government shall be divided into three distinct departments—the legislative, executive and judicial.

Sec. 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein directed or permitted.”

It is well settled by all the authorities that mandamus will not lie to compel the Governor of a State to perform duties of a purely executive or political nature, involving the exercise of official judgment and discretion, but the decisions are wide apart as to the power of the courts to compel him to discharge those duties, which as other official duties are called ministerial.

The courts of Ohio, Alabama, California, Maryland and North Carolina, are together in holding that the Governor may be required by mandamus to perform duties of the latter class; while the courts of Arkansas, Georgia, Illinois, Louisiana, Maine, Minnesota, New Jersey and Rhode Island, have uniformly held the contrary, upon the grounds that the powers of Government in the States are distributed among three departments, which under the organic law are to be and remain independent of each other: High on Extraordinary Legal Remedies, sections 118, 119, 120 and 121. This author cites the cases from the different States mentioned. We have examined them, and also a very instructive case from Michigan: *Sutherland v. The Governor* (1874), 29 Mich. 321, which is in accord with those from the States last mentioned, and we are fully persuaded not only that the weight of authority, but also the weight of reason, is against the power of the courts to coerce the Chief Executive of a State into the performance of any official duty.

This Court has heretofore put itself in line with those courts

denying the existence of such power: *Turnpike Company v. Brown* (1875), 8 Baxt. (Tenn.), 490. In that case, the Turnpike Company sought, by mandamus, to compel Governor Brown to issue certain bonds of the State which, it claimed, the Legislature had directed to be issued by the Governor. The relief was refused upon two grounds: first, because the company had not shown itself entitled to the bonds; and, secondly, because the Court had no jurisdiction to control the action of the Governor with respect thereto.

In combatting the idea that the Governor might be compelled to perform a ministerial duty, the Court, speaking through Judge McFARLAND, said: * * * "The Governor holds but one office, that is the office of Chief Executive. Any duty which he performs under authority of law is an executive duty, otherwise we would have him acting in separate and distinct capacities. In some respects he would be the Chief Executive, an independent department of the Government; as to others he would be a mere ministerial officer, subject to the mandate of any Judge of the State; and we must assume also that the Judge would have the power to imprison the Governor if he refused to obey his order, for if the Court has this jurisdiction, the power to enforce the judgment must follow." See 8 Baxt., 493. The jurisdiction was denied, upon the ground that the courts had no right to interfere with the head of another department of the Government in the discharge of a duty by law devolved upon him.

But it is now argued that so much of the opinion in that case as relates to the question of jurisdiction was *obiter dictum*, because the question decided in an earlier part of the opinion was conclusive of the case. This cannot be so. Both questions were fairly raised by the record, and the fact that the question of jurisdiction was discussed last, does not make it any the less entitled to the force of an adjudication.

It is further contended that this Court disregarded and overruled that part of that decision by taking jurisdiction of a mandamus proceeding against Governor Marks, in the late case of the *State ex rel. v. Board of Inspectors* (1880), 6 Lea (Tenn.), 12. The question of jurisdiction was expressly reserved in that case, for the reason, as stated in the opinion, that the Governor

had in his answer declared his willingness to submit to the direction of the Court.

Whether jurisdiction of the person in such a case can properly be confirmed in that way, is not material in this case. It does not arise here. It did arise there, and the Court exercised all the power of jurisdiction—whether rightfully or wrongfully, can neither affect the present case nor impair in any degree the authority of the Brown case. Jurisdiction was taken in Missouri: *R. R. v. The Governor* (1856), 23 Mo. 353, upon a similar expression from the Governor, while in Michigan it was refused: *Sutherland v. The Governor*, 29 Mich. 321.

We have no hesitation in holding that the courts have no jurisdiction to compel the Governor to deliver to complainant the certificate claimed by him, no more than have they the power to restrain him from issuing a certificate to the other applicant. If the Governor cannot be compelled by mandamus to deliver a certificate of election to one person, it follows that he cannot be restrained by injunction from delivering it to another person; for the nature of the act to be performed by him is precisely the same in one case as in the other, and the same considerations operate to defeat the jurisdiction of the courts in both instances.

But, conceding for the sake of the argument that the Governor could not, in the first instance, have been compelled to give the certificate to complainant or prevented from giving it to Evans, the very able and learned counsel of complainant go further and insist, with great force and plausibility, that the Chief Executive of a State may be enjoined from doing an unlawful thing; that, under the facts disclosed in the bill, the act sought to be restrained is unlawful, and that, being unlawful, its performance may be prevented by injunction.

The essence of these facts is that the Governor and Secretary of State together reached the conclusion from the returns that complainant had been elected, and, thereupon, prepared, signed, attested and sealed a certificate showing that fact, and that before the delivery of that certificate the Governor changed his mind, decided that Evans was elected, and without the concurrence of the Secretary of State, was about to issue a certificate to Evans, when this bill was filed.

The statute devolving upon the Governor the duty of issuing a commission or certificate of election necessarily confers upon him the right of determining when and how that duty, within the law, must be performed; and when he comes to do the thing required, he must be allowed to do it according to his own judgment as to the meaning of the law and on his own sense of official responsibility under his oath. In other words, it is his province to construe the statute for himself, and to determine for himself when he has complied with all its requirements, and when there yet remains something for him to do—whether he may act alone under a given state of facts, or must act in conjunction with another; and so long as he acts in good faith and with an honest purpose, discharging his duty under the law, his action cannot appropriately be characterized as unlawful. In such case the courts have no power to substitute their construction or judgment for his, and tell him when to stop or when to go on.

If they have such authority as to one statute imposing an obligation upon him, they have it as to all such statutes, and with respect to all requirements made of him by the Constitution as well.

Such a view would put the responsibility of the Governor's office upon the judiciary, and virtually make him subject to the direction of the courts in every action he might take—thereby working a substantial destruction of one department of the State Government, and a usurpation of its functions by another, contrary to the genius, spirit and letter of the Constitution.

If the Governor act corruptly he is amenable to the Legislature; and if, in an honest endeavor to discharge his duty, he mistake the law and prejudice individual rights, the injured person may in proper cases restrain the one benefited from using his advantage.

Let us illustrate the connection and at the same time the independence, the checks and balances, of the three departments of government: The Legislature should never pass nor the Governor approve an unconstitutional law; yet, because the duty of enacting laws rests upon the one, and that of approving or disapproving them upon the other, the courts cannot

restrain the former from passing nor the latter from approving a statute obviously unconstitutional. While acting in their own appropriate spheres the Legislature and the Governor must be allowed to judge of the constitutionality of the law for themselves. After that the judiciary acts, and, at the suit of some interested party, annuls the law because violative of the Constitution. Thus the integrity and independence of each department are preserved, conflict between them is prevented, and the injurious application of an unconstitutional law is averted.

We do not think the decisions of the Supreme Court of the United States stand in the way of the conclusion we have reached, though the Federal courts have, in several instances, taken jurisdiction of proceedings against the Governors of certain States and put them under restraint by injunction.

In *Davis v. Gray* (1872), 16 Wall. (83 U. S.) 203, Gov. Davis, of Texas, was enjoined from wrongfully issuing patents to land, which had previously been granted to other persons. The Governor of Louisiana was restrained from issuing bonds under an unconstitutional act, in the case of *Board of Liquidation v. McComb* (1875), 92 U. S. 531. In another case, the Governor of Missouri and others acting with him were by injunction prevented, or restrained for a time, from selling certain property to enforce statutory mortgage liens claimed by the State, the claim by the adverse party being that the liens had been satisfied: *Ralston v. Missouri Fund Commissioners* (1886), 120 U. S. 391.

The Davis case was cited approvingly in *Allen v. Railroad* (1884), 114 U. S. 311, and *In Re Ayers* (1887), 123 Id. 506; while it was questioned and limited in *Cunningham v. Macon & Brunswick Railroad* (1883), 109 Id. 453.

Now, the most that can be said of these cases is, that they show the jurisdiction of the Federal courts to restrain the Governor of a State from doing a wrongful act to the injury of individual rights. It is not even intimated in any one of them that the State courts have any such jurisdiction. There is a wide difference between the relation of the Federal judiciary and the State judiciary to the Governor of the State, and because of that difference, the Federal decisions referred to are

not at all in point in this case. A State's judiciary sustains the same relation to its Governor that the Federal judiciary does to the President of the United States; and as a State court, by reason of that relation, has no jurisdiction to coerce or restrain the Governor with respect to his official duties, so the Federal courts, for the same reason, have no power to interfere with the official acts of the President. It was so held in the case of the *State of Mississippi v. Johnson* (1866), 4 Wall. (71 U.S.) 499. In that case, the State of Mississippi, as party complainant, sought by injunction to restrain President Johnson from the execution of the reconstruction acts of Congress, upon the allegation that they were unconstitutional. The Court held that it had no jurisdiction either to compel the President to execute constitutional laws, or to restrain his action under unconstitutional legislation.

The reasoning of the Court is embraced in the following quotation from the opinion of Chief Justice CHASE, who spoke for the whole Court:

"It will hardly be contended that Congress (the courts?) can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet, how can the right of judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President? The Congress is the legislative department of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such inference will be clearly seen upon consideration of its possible consequences.

"Suppose the bill filed and the injunction prayed for allowed. If the President refuses obedience it is needless to say the Court is without power to enforce the process. If, on the other hand, the President complies with the order of the Court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the Executive and Legislative Departments of the Government? May not the House of Representatives impeach the President for such refusal? And in that case could this Court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a Court of Impeachment? Would the strange spectacle be offered to the public world of an attempt by this Court to arrest proceedings in that Court?

"The questions answer themselves:" 4 Wall. 500 and 501.

The case of *Marbury v. Madison* (1803), 1 Cranch (5 U. S.)

137, is not in conflict, and could not be, for the President was not a party.

It may be of some interest, and not inappropriate at this point to note the fact that an unseemly conflict was narrowly escaped in that case, though the case was not against the President himself, but only against a member of his Cabinet.

Chief Justice GREEN, of New Jersey, says: "We have Mr. Jefferson's authority for saying that if the Supreme Court had granted a mandamus in the case of *Marbury v. Madison*, he should have regarded it as trenching on his appropriate sphere of duty; that he had instructed Mr. Madison not to deliver the commission, and that he was prepared, as President of the United States, to maintain his own construction of the Constitution with all the powers of the Government, against any control that might be attempted by the judiciary, in effecting what he regarded as the rightful powers of the Executive and Senate within their peculiar departments:" *The State v. The Governor* (1856), 25 N. J. L. 351.

The question of jurisdiction being conclusive, it has not been deemed important to decide whether, under the peculiar language of the statute, the delivering of the certificate made out for the complainant was necessary to invest him with a title to the office; nor whether, after the signing, attesting and sealing of that certificate, the Governor could rightfully reconsider his action and, without concurrence of the Secretary of State, issue to Evans a certificate.

But if the law be, as claimed in the bill and in the argument, that what was done with respect to the first certificate gave complainant a complete title and exhausted the power of the Governor, and that he could properly act only in conjunction with the Secretary of State, then, of course, a subsequent certificate by the Governor to Evans would neither confer title upon him nor impair the title of complainant; and there would be no sufficient reason for seeking the aid of a court of equity.

Let the decree be affirmed, and the bill dismissed at the cost of complainant.

This case is of interest as furnishing one more authority on the much mooted question of the jurisdiction of the State courts over the Governor, to compel by mandamus the performance of a ministerial act.

The general principle is of course well settled, that no public functionary of whatever grade can be compelled by the courts to perform his executive or political duties. It is quite equally well settled that, generally speaking, public officers can be required, through judicial process, to perform duties purely ministerial. A ministerial duty, as contra-distinguished from those of the executive or political class, is understood to be one in which nothing is left to discretion, but which the person upon a given state of facts performs in a prescribed manner in obedience to law: *State of Mississippi v. Johnson* (1867), 4 Wall. (71 U. S.) 498; *Flournoy v. City of Jeffersonville* (1861), 17 Ind. 169, 174.

In 1839, a case came before the Supreme Court of Arkansas on petition for mandamus, commanding the Governor to issue a commission to the petitioner as a commissioner of public buildings duly elected. The Governor declined to issue the commission, alleging as a ground for refusal that, when the election was held, there was no law in force authorizing the Legislature to hold an election for the office. The Court, without considering the merits of the case, refused the mandamus on the ground that under our system of government, the legislative, executive and judicial departments are independent of one another, and that no control, direction or review of the exercise of the functions of one department was contemplated as existing in another. The issuing of commissions was required of the Governor by a constitutional provision. It was a political duty which was not enforceable by judicial mandate.

Nor could the fact that the act to be performed was merely of a ministerial or perfunctory nature, break down the barrier of separation between the departments which had been established. Said the Court in concluding its opinion, speaking by LACY, J.: "The analysis of his duties, then, clearly proves that he is in no way amenable to the judiciary for the manner in which he shall exercise or discharge these duties. His responsibility rests with the people and with the Legislature. If he does an unconstitutional act, the judiciary can annul it, and thereby assert and maintain the vested rights of the citizen. The writ asked for, however, does not proceed upon the ground that the Governor has done any illegal or unconstitutional act, but that he has refused to perform a legal or constitutional duty. In the first case, the Court certainly has jurisdiction; and in the last, they certainly have not. The Court can no more interfere with executive discretion, than the Legislature or Executive can with judicial discretion. The Constitution marks the boundaries between the respective powers of the several departments, and to obliterate its limits would produce such a conflict of jurisdiction as would inevitably destroy our whole political fabric; and with it, the principles of civil liberty itself. It would be an express violation of the Constitution, which declares upon its face, that there shall be three separate and independent departments of government, and that no person or persons, being of one of these departments, shall exercise any power belonging to either of the others:" *Hawkins v. Governor* (1839), 1 Ark. 570.

In 1856, an application for mandamus was made in Ohio, upon the relation of a banking association, to compel the Governor of the State to issue his proclamation, as required by statute, announcing that the relator was

entitled to commence and conduct the business of banking. The Court refused the mandamus on other grounds, but declared that ordinarily mandamus would lie against the Governor to compel the performance of his ministerial acts, such as the one before the Court. The grounds of the decision were, that, although by the Constitution the Governor was invested with important political powers, in the exercise of which his determinations were conclusive, yet that there was nothing in the nature of the chief executive office of the State which prevented the performance of duties merely ministerial being required of the Governor. The duty in question was merely ministerial, was required by statute, and might have been devolved upon any other officer of the State. It was not necessarily connected with the supreme executive power of the State. Such being the case, the Governor was amenable to law and could be required to do the specific act the same as any other public officer: *State v. Chase* (1856), 5 Ohio St. 528. This ruling was in the line of an utterance of the same Court as early as 1832, in *State ex rel. Loomis v. Moffitt*, 5 Ohio 358 (which was a *quo warranto* proceeding to try the title to a judgeship), to the effect that mandamus will lie against the Governor to compel him to issue a commission to a properly certified party, since "the Governor is no less amenable to law than the most humble citizen."

The principle enunciated in the Ohio case in 1856, would of itself be quite reconcilable with that of the earlier case in Arkansas, if there were nothing to follow by way of development of the principles of those cases. The two cases taken together, might be understood as establishing that the performance of an act required of the Governor by constitutional provision could not be compelled by mandamus, while

the duty of performance of an act purely ministerial in its nature, if placed upon the Governor by the Legislature, might be enforced by such a proceeding. As matter of fact, however, later cases go much further on each side of the question, so that a harmony of decisions upon the above ground or upon any other is quite impossible.

The following are the decisions affirming the power in the courts to mandamus the Governor:

State v. Chase, supra.

Tennessee & Coosa R. R. Co. v. Moore (1860), 36 Ala. 371.

A sum of money had been loaned to a railroad company by act of the Legislature which required the Governor to draw his warrant in favor of the company upon certain terms being complied with, which it was shown had been done. The Court directed the issue of the writ.

Cotten v. Ellis (1860), 7 Jones (N. C.) 545.

Upon the relation of the Adjutant-General of North Carolina, the Court directed the writ to issue to compel the Governor to draw his warrant on the State Treasurer for salary earned.

State v. Kirkwood (1862), 14 Iowa 162.

The application was for a mandamus to compel the Governor to issue a certificate for certain lands. The petitioner had not complied with the conditions of the law and it was refused. The jurisdiction was, however, assumed to exist, to compel the Governor to perform ministerial duties.

Middleton v. Low (1866), 30 Cal. 596.

The Court declined to issue a mandamus upon the facts, but conceded that it would issue to compel the Governor to sign a patent for lands, upon the relator complying with the necessary provisions of the law.

Magruder v. Swann (1866), 25 Md. 173.

The application here was for a mandamus, to compel the Governor to issue a commission to the petitioner, who was elected judge, as appeared by the certificate of the clerk of the county. The duty of issuing commissions was imposed upon the Governor by Article IV, section 149, of the State Constitution of 1864, which provided that "all elections of judges and other officers provided for by this Constitution, State's attorneys excepted, shall be certified, and the returns made by the clerks of the respective counties to the Governor, who shall issue commissions to the different persons for the offices to which they shall have been respectively elected." The mandamus was allowed on the ground that, although the duty enjoined on the Governor was contained in the Constitution, it was not in that portion of the instrument relating to executive duties. Being purely a ministerial duty, it could therefore be required of the Governor or of any lower officer.

Harpending v. Haight (1870), 39 Cal. 189.

The Court directed the writ to issue, requiring the Governor to cause to be authenticated as a statute, a certain bill which had passed both houses of the Legislature and had not been returned with his veto. Mr. Justice TEMPLE dissented, on the ground that the duty to be performed was devolved upon the Governor by the Constitution, and that as to such duties, he was absolutely independent of control by the judiciary. [*Contra*, in Illinois: *People v. Yates*, *infra*].

Groome v. Gwinn (1875), 43 Md. 573.

The Court, by mandamus, directed the Governor to issue a commission and administer the oath of office to the Attorney-General, who had been duly returned elected.

Chumasero v. Potts (1875), 2 Mont. 242.

Mandamus was issued against a canvassing board, consisting of the Secretary, Marshal and Governor of the State, to compel a canvass of all the votes of the territory after a certain election, to determine the question of the removal of the seat of territorial government.

In re Cunningham (1875), 14 Kan. 416.

The Supreme Court of Kansas raised no objection to the issuing of the writ on jurisdictional grounds, but refused to compel the Governor to issue a patent for lands, because certain conditions had not been complied with by the petitioner.

Gray v. State (1880), 72 Ind. 567.

Mandamus was allowed against the Governor, Attorney-General, Treasurer, and Secretary of State, directing them to redeem certain bonds of the State, for whose redemption a specific fund had been provided. It was held, that other persons being joined with the Governor, upon whom, with him, was laid the duty to perform the act, it was not in any sense executive, but in the purest sense ministerial. There had been at least two previous decisions in Indiana, in which the courts issued the writ against the Governor. These were: *Governor v. Nelson* (1855), 6 Ind. 496, where the Governor was compelled to issue a commission to the clerk of a circuit court; and *Baker v. Kirk* (1870), 33 Ind. 517, where the issuing of a commission to a plaintiff as the director of a State prison, was directed. In neither of these cases, however, was the right of the Court to issue the mandamus against the Governor disputed.

The following are the decisions denying the power in the courts to issue the writ:

Hawkins v. Governor, supra; Low v. Towns (1850), 8 Ga. 360.

The Court declined to compel the Governor to issue a commission to Low as clerk of court, a statute providing that such officers should be commissioned by the Governor. The justices saw no reason why the chief executive should not be compelled by mandamus to perform a ministerial act, but refused the writ for political reasons. The Governor, it was said, has certain other duties to perform, which the needs of the people require to be done. A refusal on the part of the Governor to comply with the order of court, would subject him to imprisonment, in the event of which the person chosen by the people to act as Governor could not exercise his necessary functions.

In re Dennett (1851), 32 Me. 508. The Court declined to issue a mandamus against the Governor and council to compel them to declare the election of the petitioner to the office of county commissioner. The duty required of them was statutory.

State v. Governor (1856), 25 N. J. L. 331.

Mandamus was refused to compel the Governor to issue a commission to the applicant as surrogate of the county of Passaic. A constitutional provision required the Governor to issue commissions to officers of the State requiring to be commissioned. The refusal of the writ was put on the ground, *inter alia*, that the Court had no power to award a mandamus, either to compel the execution of any duty enjoined on the Executive by the Constitution, or to direct the manner of its performance.

People v. Bissell (1857), 19 Ill. 229.

The Court declined to compel the Governor to issue to the petitioner certain new bonds of the State, which a statute required should be issued in payment of arrears of interest on old bonds.

People v. Yates (1863), 40 Ill. 126.

The Court, upon facts quite identical with those in *Harpending v. Haight, supra*, decided directly contrary to the California court.

Mauian v. Smith (1865), 8 R. I. 192.

The Court refused to issue the writ against the Governor to compel him to convene a court martial for the trial of charges preferred against the petitioner.

State v. Governor (1867), 39 Mo. 388.

The Supreme Court of Missouri decided that it had no jurisdiction over the Governor to compel him to issue to relator a commission as a county justice. The duty of issuing such commissions was placed upon the Governor by constitutional provision, and, as a political duty, was not under the control of the courts. The same Court at an earlier period (1856), had issued a writ of mandamus against the Governor, but the latter had admitted the jurisdiction by expressing his willingness to perform the duties devolved upon him, if the Court should so direct.

Pacific Railroad v. Governor 23 Mo. 353; *State v. Warmouth* (1870), 22 La. An. 1.

A statute required the Governor to sign and deliver to the State Auditor, for issuing to parties entitled, bonds due contractors for public works. The Court declined to compel the Governor to sign and deliver certain bonds claimed by the petitioner.

Rice v. Austin (1872), 19 Minn. 103.

The Court refused the writ asked for to compel the Governor to execute and deliver to petitioner a deed of certain lands claimed under the provisions of a statute. The act was conceded to be a ministerial act. In an earlier case in the State, *Chamberlain v. Sibley* (1860), 4 Minn. 309, it was admitted *obiter*, that the Governor could be compelled to perform his ministerial duties. In *Rice v. Austin*, however, the dictum in *Chamberlain v. Sibley* was repudiated.

(without reference to the case however), and the independence of the executive department declared to depend as much upon the non-interference of the judiciary in the ministerial functions of his office as in those strictly executive in their nature.

Sutherland v. Governor (1874), 29 Mich. 320.

The application to the Court was for an order requiring the Governor to show cause why he did not issue a certificate, showing that the Portage Lake and Lake Superior ship canal and harbor had been constructed in conformity to an act of Congress, which required the Governor to issue his certificate of the fact. Mr. Justice COOLEY for the Court, in refusing the writ, took very broad grounds against the jurisdiction, declaring that all duties imposed upon the Governor as such, whether by constitution or by statute, were official, and in the matter of their performance, he was not liable to mandamus.

Turnpike Company v. Brown (1875), 8 Baxt. (Tenn.) 490.

The facts of this case were as recited in the principal case, the Court refusing the mandamus.

In *Appeal of Hartranft et al.* (1877), 85 Pa. 433, it was held by the Supreme Court of Pennsylvania that the Governor and certain other State officers were not liable to attachment for disobeying a subpoena to testify before a grand jury as to matters of fact in connection with certain riots at Pittsburgh, with which facts they became conversant in performing the duties of their respective offices. In the course of the opinion, the Court, referring to *State v. Warmouth, supra*, approves of the doctrine that the Governor is not subject to mandamus, to compel the performance of a ministerial duty.

State v. Drew (1879), 17 Fla. 67.

The mandamus asked for was to have the Governor compelled to issue

to the relator a commission as United States Representative, after the Board of Canvassers had declared him elected. The laws of Florida required the Governor to make out, sign, cause to be sealed and transmit a certificate of election. The writ was refused, Mr. Justice WESTCOTT dissenting.

People v. Cullom (1881), 100 Ill. 472.

The Court of last resort in Illinois declined to mandamus the Governor to call an election as required by law.

SUMMARY.

It will thus be seen that the courts of nine States and Territories (to wit, Alabama, California, Indiana, Iowa, Kansas, Maryland, Montana, North Carolina, and Ohio), affirm the jurisdiction; while the courts of eleven States (to wit, Arkansas, Florida, Georgia, Illinois, Louisiana, Maine, Michigan, Missouri, New Jersey, Rhode Island, and Pennsylvania), deny it.

In the difference of opinion that has existed among the State courts, resort has been had to the decisions of the Supreme Court of the United States, on the subject of mandamus to executive officers of the Federal Government. The Federal courts, as shown in the principal case, have several times enjoined State Governors. These decisions are, however, scarcely relevant to the question of the jurisdiction of the State courts over the executive department of the State. The Federal Government sprang not from the States, but from the people of the United States. If the Governor of a State refuses to perform a ministerial duty, lawfully required of him, and the Federal courts have jurisdiction on other grounds, there is perhaps no reason why they should decline jurisdiction by mandamus or injunction, merely because his status *qua* the State, happened to be that of chief executive officer. There is apparently nothing in

the relations of the Federal and State systems, requiring the Federal courts to regard as independent of their control, the executive officers of a State. The Federal courts are bound to respect the separation of functions of the legislative, executive and judicial departments established by the Constitution of the United States, and to recognize the independence of each, but this obligation does not require the same recognition of the similar departments established by the State. It was decided in *Kentucky v. Dennison* (1860), 24 How. (65 U. S.) 66, that Congress had no power to impose duties upon State officers, and that such duties attempted to be imposed the Federal court could not enforce. But as indicated above, a ministerial duty plainly and lawfully required of a State officer, is clearly within the cognizance of the Federal courts.

The only relevant analogy in the Federal legislation is the relation of the Federal courts to the President. It has never been decided that the President is or is not subject to mandamus to compel him to perform ministerial duties.

Marbury v. Madison (1803), 1 Cranch (5 U. S.) 137, is the leading case on mandamus in the United Courts. The action was brought to compel President Jefferson's Secretary of State, Mr. Madison, to deliver to the plaintiffs their commissions as justices of the peace in the District of Columbia. They had been appointed and confirmed during the administration of President Adams, and their commissions had been signed and sealed. The Court decided that the Supreme Court of the United States had no original jurisdiction to consider the case, and discharged the rule which had been granted. Chief Justice MARSHALL, however, in the course of his opinion, declared in favor of the granting of the

writ in general against public officers, for the performance of such ministerial duties as were required of Mr. Madison. The principles there stated have been recognized and followed, as applied to similar cases. Some of the expressions used have furnished the basis for the doctrine of those courts that sustain the issuing of the writ against the Governor. For example, it was said, *inter alia*, by the Court: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined:" p. 170.

There are other expressions, indicating that there was no purpose to express an opinion that the President, equally with his cabinet officers, was amenable to the writ. And, indeed, it was conceded by counsel in the case, that the President was not personally subject to mandamus; Charles Lee, attorney for the plaintiffs, who had been Attorney-General, saying, p. 149: "I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode provided in the Constitution."

A number of other cases have confirmed the jurisdiction of the courts to compel the performance of the purely ministerial duties of cabinet and other similar officers. Among these are *Kendall v. United States* (1838), 12 Pet. (37 U. S.) 524; *United States v. Schurz* (1880), 102 U. S. 378; *Butterworth v. United States* (1884), 112 Id. 50; *United States ex rel. Miller v. Black* (1888), 128 Id. 40.

In the *State of Mississippi v. Johnson* (1867), 4 Wall. (71 U. S.) 475, it was sought to enjoin President Johnson from carrying out the Reconstruction Acts. The Court ruled, upon the only point

necessary to a decision, that the President cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional. It refused (p. 498), to express an opinion whether, in any case, the President might be required by the process of the Court to perform a purely ministerial act under a positive law. In the briefs of counsel in this case are presented very fully and forcibly the arguments that exist in favor of and against the jurisdiction of the courts over the chief executive officer of the United States.

In the course of the opinion of the Court in *Kendall v. The United States* (1838), 12 Pet. (37 U. S.) p. 610, it was said: "The executive power is vested in a President; and as far as his powers are derived from the Constitution he is beyond the reach of any other department, except in the mode prescribed by the Constitution, through the impeaching power."

In the judgment of the writer, the weight of the argument is with the view taken by the Supreme Court of Tennessee in the principal case, that mandamus will not lie against the Governor. The courts that take jurisdiction, do so on the general principle that when one man shows himself entitled to a specific thing in the form of property or office and he is deprived of it by another, the courts will provide the means for his obtaining it, following the maxim that there is no wrong without a remedy. If this were the only possible aspect of the question, there would be no reason for the court withholding its arm in any case where the failure to perform a ministerial duty were established to its satisfaction, whether the defendant happened to be the Governor of the State, or an officer of less dignity.

It is quite impossible, however, to ignore the fact that the courts exercise

their functions as part of a governmental system embodied in a written constitution, which has as its fundamental principle of organization the complete independence of the executive and judicial as well as legislative departments. If the judicial department may, in any case, direct or control the performance of a duty by another department, the barrier of separation is at once broken down.

It is no answer to say that in matters purely ministerial, the Governor does not exercise executive functions, and therefore is subject to judicial control as to such acts. Said TALIAFERRO, J., in *State v. Warmouth*, *supra*: "We think this doctrine objectionable in this, that it accords to the judiciary the large discretion of determining the character of all the acts to be performed by the chief executive officer, as being merely ministerial or otherwise. This would infringe the right of the executive to use discretion in determining the same question. He must be presumed to have this discretion, and the right of deciding what acts his duties require him to perform, otherwise his functions would be trammelled, and the executive branch of the Government made subservient in an important feature to the judiciary."

If it be said that to give the governor the power of final determination, as to the performance of acts required of him, would be to acknowledge an authority higher than the law, the answer is at hand, that the law from which the judges derive their power to act is the constitution, and no supremacy or control can be asserted or maintained by them that is not recognized by that instrument.

The best answer to the position, that if the governor is free from control by the courts, parties having rights will in many cases be left without remedy, is given by COOLEY, J., in *Sutherland v.*

Governor (1874), 29 Mich., at page 330: "Practically, there are a great many such cases, but, theoretically, there are none at all. All wrongs, certainly, are not redressed by the judicial department. A party may be deprived of a right by a wrong verdict, or an erroneous ruling of a judge, and though the error may be manifest to all others than those who are to decide upon his rights, he will be without redress. A person lawfully chosen to the legislature may have his seat given by the house to another, and be thus wronged without remedy. A just claim against the State may be rejected by the board of auditors, and neither the governor nor the courts can give relief. A convicted person may conclusively demonstrate his innocence to the governor, and still be denied a pardon. In which one of these cases could the denial of redress by the proper tribunal, constitute any ground for interference by any other authority? The law must leave the final decision upon every claim and every controversy somewhere, and when that decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial. The party applying for action, which under the constitution and laws, depends on the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy and must submit to the decision."

And it is not easy to see why the courts shall have any more power of control over the action of the governor in any given case, if the duty required of him happens to be statutory, than if imposed by the constitution. So long as it is required of him as governor, that is, as the functionary occupying the chief executive office, in performing it, it would seem, he may claim the officer's immunity from control.

Of course it is not contended that the governor, as a private citizen, is free from liability to judicial process. It is admitted by all the courts that for his private acts, or for any acts not properly within the scope of his office, he is, as any other citizen, amenable to process.

The logic of the argument relieving the governor from judicial process, requires that where, by the constitution of the State, the executive department is specifically vested in other officers with him, they, as well as he, are free from control or direction at the hands of the courts. Accordingly, in *Houston Tap & Brazoria R. R. Co. v. Randolph* (1859), 24 Tex. 317, the Court for this reason refused to compel the Treasurer of the State to pay certain bonds, the warrants for whose payment were duly presented, in strict compliance with law.

So, in *County v. Dike* (1874), 20 Minn. 363, the Constitution of Minnesota providing that the executive department should consist of a governor, lieutenant-governor, secretary of state, auditor, treasurer, and attorney-general, chosen by the electors of the State, it was held that a mandamus would not lie against the State Treasurer and Secretary of State.

It will be observed that the Constitution of the United States vests the executive power solely in the President. It is, therefore, quite in keeping with the above view, that mandamus proceedings should be entertained against Cabinet officers in certain cases, since they are not, by the organic law, vested with any executive power, and therefore made part of an independent branch of the Government.

The judgment in the principal case has been criticised as not being warranted by the facts. It has been urged that the case really presented the question of whether the Governor, after signing the commission, which entitled

the relator to it as a vested right, could lawfully withhold it from him or issue a commission to another. Counsel for the relator contended with much force that the Governor's power of acting being *functus officio*, he could not preserve an immunity from judicial cognizance of his subsequent acts in the matter, merely because he honestly believed that, as Governor, he still had the power to act by awarding the commission to another. If, as Governor, he had no further power to act, it was forcibly urged he could not obtain that power merely by supposing he had it. It was therefore deemed by the relator essential that the Court should pass upon the question of his title. This the Court declined to do, resting its decision solely upon the ground that no jurisdiction existed to control the Governor's acts in the premises. It seems to the annotator obvious that the Court upon its view of the constitutional question involved, was right in declining to enter into any other discussion. The Court either had or had not jurisdiction over the Gov-

ernor by mandamus and injunction in his official capacity. The fact that the Governor assumed to act, when his power was exhausted, could not give jurisdiction to the courts, if the law of the land denied it. The fact that practically an irreparable wrong might be perpetrated by the Governor upon the relator by withholding his commission, could not vest authority in the courts to redress the wrong, if they had not that power given them under the system of government of which both the executive and the judiciary were parts.

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Philadelphia.

[In the case of *Riley v. Hovey*, decided by the Supreme Court of Indiana, May 18, 1889, the court ordered a mandate against the Governor, compelling him to issue a commission to Riley as a trustee, elected by the Legislature, for the Institution for the Blind. The question agitated, however, was merely whether the Legislature could elect to the office.] J. B. U.

Supreme Court of the United States.

WHITE, ET AL., v. COTZHAUSEN.

When an insolvent debtor transfers substantially all his property to a part of his creditors, the form of the transfer or transfers will be disregarded, and a statute forbidding preferences in assignments for the benefit of creditors will be held applicable in equity to authorize proceedings of an equal distribution of the assets among all the creditors.

The mere name of the particular instruments used will be disregarded in equity, and the court will consider whether the financially embarrassed debtor has, in good faith, and without a present purpose of discontinuing business, compromised his liabilities by sale or transfer of his property.

The attempt to obtain an illegal preference over other creditors, will not deprive the creditor making such an attempt, of his equal share in the estate of the insolvent debtor.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was an appeal from a decree declaring two conveyances of real property in Illinois, a bill of sale of numerous pictures, a judgment by confession in one of the courts of that State pursuant to a warrant of attorney given for that purpose, and certain transfers of property accompanying that warrant, to be void as against the appellee, Cotzhausen, a judgment creditor of Alexander White, Jr. It was assigned for error that the decree was not supported by the evidence. Besides controverting this position, the appellee contended that the conveyances, judgment by confession, and transfers, were illegal and void under the provisions of the Act of the General Assembly of Illinois, in force July 1, 1877, concerning voluntary assignments for the benefit of creditors. 1 Starr & C. St. 1303 (see the quotations in the opinion of the Court, *infra*).

The record contained a large amount of testimony, oral and written, but the principal facts were as follows: Alexander White, Sr., died intestate in the year 1872; his wife, Ann White, four daughters, Margaret, Elsie, Mary S., and Annie, and two sons, Alexander and James B., surviving him. Each of the children, except James, was of full age when the father died. At the request of the mother, and with the assent of his sisters,

Alexander White, Jr., qualified as administrator, and in that capacity received personal assets of considerable value. With their approval, if not by their express direction, he undertook the management of the real estate of which his father died possessed; making improvements, collecting rents, paying taxes and causing repairs to be made. He received realty in exchange for stock in a manufacturing company, and in part exchange for the homestead, taking the title in his own name. After the death of the father, the widow and children remained together as one household, the expenses of the family, and of each member of it, being met with money furnished by Alexander White, Jr., out of funds he received from time to time, and deposited in bank to his credit as administrator. But no regular account was kept, showing the amount paid to or for individual members of the family. In 1878, it was determined by the widow and children to have an assignment of dower and a partition of the real property, and proceedings to that end were instituted in the Circuit Court of Cook county, Illinois. Before the close of that year, or in the spring or summer of 1879, having failed to obtain from the administrator a satisfactory account of the condition of the estate, they consulted an attorney, who, upon investigation, ascertained (using here the words of appellants' counsel) that Alexander White, Jr., "had lost the entire personal estate, and had nothing, except his interest as an heir in certain of the real estate, with which to make good his losses." It appeared, as is further stated, that he had mortgaged some of the real property, the title to which had been taken in his name; had anticipated rents on other property; had exchanged lands for stock in a heating and ventilating company; had allowed taxes to accumulate; and had, besides, induced some members of the family to guaranty his notes to a large amount. Upon these disclosures being made, the property was put under the immediate charge of the younger son, and the attorney with whom the mother and sisters had advised, was directed to collect the amount due from Alexander White, Jr. Thereupon a friendly accounting was had, which resulted in a report by him to the Probate Court, on the 18th of July, 1879, of his acts and doings as administrator during the whole period from the date of his

appointment, April 9, 1872, to July 21, 1879. The report admits a balance due from him as administrator of \$89,646.05, and charges him, "by virtue of the statute" (Rev. St. Ill. 1874, c. 3, § 113), with \$40,123.80, being interest on that sum from January 21, 1875, to July 21, 1879, at the rate of 10 per cent. per annum; in all, the sum of \$129,769.85. He does not seem to have asserted any claim whatever for his services as administrator, or for managing the real property. That report was approved by the Probate Court, which made an order, July 22, 1879, directing the said sum of \$129,769.85 to be distributed and paid by the administrator as follows: To the widow, \$43,256.61, and to each of the other children, \$14,418.87. It should be stated in this connection, that on the 16th of July, 1879, two days before the report to the Probate Court, the proceedings in the partition suit were brought to a conclusion by a decree assigning dower to the widow, and setting off specific parcels of land to Margaret and Alexander, respectively, and other parcels to the remaining heirs jointly. On the same day, Alexander White, Jr., executed two conveyances—one to his sisters (except Margaret), and his brother James, jointly, for part of the lands assigned to him by the decree of partition, and the other to his sister Margaret, for the remaining part; the former deed reciting a consideration of \$56,859.20, which is about the aggregate of the several amounts subsequently directed to be paid by the administrator to his brother and sisters (except Margaret), while the latter deed recited a consideration of \$14,214.80, which is about the sum directed to be paid to his sister Margaret. Two days later, July 18, 1879, Alexander White, Jr., executed to his mother, brother, and sisters (except Margaret), a bill of sale of his interest in certain pictures which had come to his hands as administrator; and three days thereafter, July 21, 1879, he executed to his mother a note, accompanied by a warrant of attorney to confess judgment, and by a conveyance and transfer of certain real and personal property as collateral security for the note. Subsequently, September 4, 1879, pursuant to that warrant of attorney, judgment was entered against Alexander White, Jr., for \$43,807.50, in the Circuit Court of Cook county. It is not claimed that any money was paid to him in

these transactions, and it is admitted that the sole consideration for his transfers of property to the members of his family was his alleged indebtedness to them, respectively.

By the final decree in these consolidated causes, it was adjudged that the two conveyances of July 16, 1879, the bill of sale of July 18, 1879, and the judgment by confession of September 4, 1879, and the transfers accompanying the warrant of attorney of July 21, 1879, were made without adequate consideration, and with intent to hinder, delay, and defraud the appellee, Cotzhausen, who was found by the decree to be a creditor of Alexander White, Jr., in the sum of \$27,842.22, the aggregate principal and interest of four several judgments obtained by him against White, in 1881 and 1882. The debts for which these judgments were rendered, originated in the early part of 1878, in a purchase from Cotzhausen of nearly all the stock of the American Oleograph Company, whose principal place of business was Milwaukee, Wisconsin. In this purchase Alexander White, Jr., was interested. It is to be inferred from the evidence that the principal object he had in making it, was to transfer the office of the company to one of the buildings owned by the family in Chicago, and to start or establish his younger brother in business. His mother and sisters were evidently aware of his purchase, and approved the object for which it was made. It may be here stated that Margaret White died unmarried and intestate before the decree in this cause was entered, but the fact of her death was not previously entered of record. The parties to the present appeal, however, by written stipulation filed in this cause, waived all objections they might otherwise make by reason of that fact. It was further stipulated that the appellants were the only heirs at law of Margaret White. The appellee waived all objections to the present appeal on the ground that Alexander White, Jr., did not join in it.

Ira W. Buell and *C. M. Osborn*, for appellants.

Enoch Totten and *John C. Spooner*, for appellee.

Mr. Justice HARLAN, January 28, 1889. (*After stating the facts as above*):

Too much stress is laid by the appellee upon the fact that Alexander White, Jr., after qualifying as administrator, was authorized by his mother and sisters to control, in his discretion, both the real and personal estate, of which his father died possessed. The granting of such authority cannot be held to have created any lien in favor of his creditors upon their respective interests. Nor can it be said that they surrendered their right to demand from him an accounting, in respect to his management of the property. Upon such accounting, he might become indebted to them; and, to the extent that he was justly so indebted, they would be his creditors, with the same right that other unsecured creditors had to obtain satisfaction of their claims. The mode adopted by them to that end, with full knowledge as well, of his financial condition, as of the fact that he was being pressed by Cotzhausen, was, to take property on account of their respective claims. After he had executed the conveyances, bill of sale, warrant of attorney, and transfers, to which reference has been made, he was left without anything that could be reached by Cotzhausen. So completely was he stripped by these transactions of all property, that, subsequently, when his deposition was taken, he admitted that he owned nothing, except the clothing he wore. He recognized his hopelessly insolvent condition, and formed the purpose of yielding to creditors the dominion of his entire estate; and it is too plain to admit of dispute, that in executing to his mother, sisters, and brother, the conveyances, bill of sale, warrant of attorney, and transfers in question, his intention was to give them, and their intention was to obtain, a preference over all other creditors. What was done, was in execution of a scheme for the appropriation of his entire estate by his family, to the exclusion of other creditors, thereby avoiding the effect of a formal assignment.

The first question, therefore, to be considered is, whether the several writings executed by Alexander White, Jr., for the purpose of effecting that result, may be regarded as, in legal effect, one instrument, designed to evade or defeat the provisions of the statute of Illinois, known as the "Voluntary Assignment Act," in force July 1, 1877 [Laws of 1877, page 116; 1 Starr & C. St. 1303]. The first section of that statute provides—

and spirit of the act. It will be observed this act does not assume to interfere, in the slightest degree, with the action of a debtor, while he retains the dominion of his property. Notwithstanding this act, he may now, as heretofore, in good faith, sell his property, mortgage or pledge it to secure a *bona fide* debt, or create a lien upon it by operation of law, as by confessing a judgment in favor of a *bona fide* creditor. But when he reaches the point where he is ready, and determines to yield the dominion of his property, and makes an assignment for the benefit of his creditors, under the statute, this act declares that the effect of such assignment shall be the surrender and conveyance of all his estate, not exempt by law, to his assignee, rendering void all preferences, and bringing about the distribution of his whole estate equally among his *bona fide* creditors; and we hold that it is within the spirit and intent of the statute that, when the debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken, the law will regard all his acts having for their object and effect the disposition of his estate, as parts of a single transaction, and, on the execution of the formal assignment, it will, under the statute, draw to it, and the law will regard as embraced within its provisions, all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate to or for creditors; and, if any preferences are shown to have been made or given by the debtor to one creditor over another in such disposition of his estate, full effect will be given the assignment, and such preferences will, in a court of equity, be declared void, and set aside as in fraud of the statute."

After setting out the details of the plan devised to secure certain creditors a preference in advance of the filing of the deed of assignment, the Court further said—

"It will be observed that all this was strictly in accordance with the forms of law; but will any one deny that a most palpable fraud was in fact perpetrated upon the appellee, Spaulding, by the debtors, or that the acts of the debtors were in fraud of the statute? * * * This voluntary assignment act is in its character remedial, and must therefore be liberally construed, and no insolvent debtor having in view the disposition of his estate, can be permitted to defeat its operation, by effecting unequal distribution of his estate by means of an assignment, and any other shift or artifice under the forms of law; and, whatever obstacles might be encountered in other courts of this State, a court of equity, when properly invoked, was bound to look through and beyond the form, and have regard to the substance, and, having done so, to find and declare these preferential judgments void under the statute, and to set them aside."

See, also, *Bank's Appeal* (1868), 57 Pa. 193, 199; *Winner v. Hoyt* (1886), 66 Wis. 227, 239; *Wilks v. Walker* (1884), 22 S. C. 108, 111.

We agree with the Supreme Court of Illinois that this statute, being remedial in its character, must be liberally construed; that is, construed "largely and beneficially, so as to

suppress the mischief and advance the remedy." That Court said in *Railroad Co. v. Dunn* (1869), 52 Ill. 260, 263: "The rule in construing remedial statutes, though it may be in derogation of the common law, is, that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it." See, also, *Johnes v. Johnes* (1814), 3 Dow 15. If, then, we avoid over-strict construction, and regard substance rather than form; if effect be given to this legislation, as against mere devices that will defeat the object of its enactment,—the several writings executed by Alexander White, Jr., all about the same time, to his mother, sisters, and brother, whereby, in contemplation of his bankruptcy, and according to a plan previously formed, he surrendered his entire estate for their benefit, to the exclusion of all other creditors, must be deemed a single instrument, expressing the purposes of the parties in consummating one transaction, and operating as an assignment or transfer under which the appellee, Cotzhausen, may claim equality of right with the creditors so preferred. It is true there was not here, as in *Preston v. Spaulding*, a formal deed of assignment by the debtor under the statute. But of what avail will the statute be in securing equality among the creditors of a debtor, who, being insolvent, has determined to yield the dominion of his entire estate, and surrender it for the benefit of creditors, if some of them can be preferred by the simple device of not making a formal assignment, and permitting them, under the cover or by means of conveyances, bills of sale, or written transfers, to take his whole estate on account of their respective debts, to the exclusion of other creditors? If Alexander White, Jr., intending to surrender all his property for the benefit of his creditors, and to stop business, had excepted from the conveyances, bill of sale, and transfers executed to his mother, sisters, and brother, a relatively small amount of property, and had shortly thereafter made a general assignment under the statute, it could not be doubted under the decision in *Preston v. Spaulding*, and in view of the facts here disclosed, that such conveyances, bill of sale, and transfers would have been held void as giving forbidden preferences to particular creditors; and his assignment would have been held, at the

suit of other creditors, to embrace, not simply the property owned by him when it was made, but all that he previously conveyed, sold, and transferred to his mother, sisters, and brother. But can he, having the intention to quit business and surrender his entire estate to creditors, be permitted to defeat any such result by simply omitting to make a formal assignment, and by including the whole of his property in conveyances, bills of sale, and transfers to the particular creditors whom he desires to prefer? Shall a failing debtor be allowed to employ indirect means to accomplish that which the law prohibits to be done directly? These questions must be answered in the negative. They could not be answered otherwise without suggesting an easy mode by which the entire object of this legislation may be defeated.

We would not be understood as contravening the general principle, so distinctly announced by the Supreme Court of Illinois, that a debtor, even when financially embarrassed, may in good faith compromise his liabilities, sell or transfer property in payment of debts, or mortgage or pledge it as security for debts, or create a lien upon it by means even of a judgment confessed in favor of his creditor: *Preston v. Spaulding*, *supra*; *Field v. Geohagan* (1888), 125 Ill. 70. Such transactions often take place in the ordinary course of business, when the debtor has no purpose, in the near future, of discontinuing business, or of going into bankruptcy and surrendering control of all his property. A debtor is not bound to succumb under temporary reverses in his affairs, and has the right, acting in good faith, to use his property in any mode he chooses, in order to avoid a general assignment for the benefit of his creditors. We only mean by what has been said, that when an insolvent debtor recognizes the fact that he can no longer go on in business, and determines to yield the dominion of his entire estate, and in execution of that purpose, or with an intent to evade the statute, transfers all, or substantially all, his property to a part of his creditors, in order to provide for them in preference to other creditors, the instrument or instruments by which such transfers are made, and that result is reached, whatever their form, will be held to operate as an assignment, the benefits of which may be claimed

by any creditor not so preferred, who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute. Such, we think, is the necessary result of the decisions in the highest court of the State.

The views we have expressed find some support in adjudged cases in the Eighth Circuit, where the courts have construed the statute of Missouri [Rev. Stat. Ch. 5, §354, page 54, ed. 1879], providing that "every assignment of lands, tenements, goods, chattels, effects, and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims." Referring to that statute, KREKEL, J., said, in *Kellog v. Richardson* (1883), 19 Fed. Repr. 70, 72, following the previous case of *Martin v. Hausman* (1882), 14 Id. 160—

"A merchant may give a mortgage or a deed of trust in part or all of his property, to secure one or more of his creditors; thus preferring them, but he cannot convey the whole of his property to one or more creditors and stop doing business. Such turning over and virtually declaring insolvency brings the instrument or act by which it is done within the assignment law of Missouri, which requires a distribution of the property of the failing debtor for the benefit of all the creditors in proportion to their respective claims. Such is the declared policy of the law; it places all creditors upon an equal footing."

So, in *Kerbs v. Ewing* (1884), 22 Fed. Repr. 693, where Judge McCrary, referring to the Missouri statute, said—

"No matter what the form of the instrument, where a debtor, being insolvent, conveys all his property to a third party, to pay one or more creditors, to the exclusion of others, such a conveyance will be construed to be an assignment for the benefit of all the creditors; the preference being in contravention of the assignment laws of this State."

Again, in *Freund v. Yaegerman* (1884), 26 Fed. Repr. 812, 814, it was said by TREAT, J., that the conclusion reached by Mr. Justice MILLER, and Judges McCrary, KREKEL, and himself, was—

"That, under the statute of the State of Missouri, concerning voluntary assignments, when property was disposed of in entirety or substantially—that is, the entire property of the debtor, he being insolvent—it fell within the provisions of the assignment law. The very purpose of the law was that no preference should be given. No matter by what name the end is sought to be effected, it is in violation of that statute. You may call it a mortgage, or you may make a confession of judgment, or use any other contrivance, by whatever name known, if the purpose is to dispose of an insolvent debtor's estate, whereby a preference is to be effected, it is in violation of the statute."

See, also, *Pirry v. Corby* (1884), 21 Fed. Repr. 737; *Clapp v. Dittman* (1884), Id. 15; *Clapp v. Nordmeyer* (1885), 25 Id. 71.

If Alexander White, Jr., had made a formal assignment of his entire property, in trust for the benefit, primarily or exclusively, of his mother, sisters, and brother, as creditors, its illegality would have been so apparent that other creditors would have been allowed to participate in the proceeds of sale. By the conveyances, bill of sale, confession of judgment, and transfers, all made about the same time, and pursuant to an understanding previously reached, he has effected precisely the same result as would have been reached by a formal assignment to a trustee for the exclusive benefit of his mother, brother, and sisters. The latter is forbidden by the letter of the statute, and the former is equally forbidden by its spirit. Surely, the mere name of the particular instruments by which the illegal result is reached ought not to be permitted to stand in the way of giving the relief contemplated by the statute. Courts of equity are not to be misled by mere devices, nor baffled by mere forms.

It remains only to consider the effect of these views upon the decree below. We have already seen that the Circuit Court proceeded upon the ground that the conveyances, bill of sale, confession of judgment, and transfers by Alexander White, Jr., were made without adequate consideration, and with intent to hinder, delay, and defraud the appellee. Upon these grounds, it gave him a prior right in the distribution of the property. We are not able to assent to this determination of the rights of the parties, for the mother, sisters and brother of Alexander White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over other creditors. But their attempt to obtain such illegal preference ought not to have the effect of depriving them of their interest, under the statute, in the proceeds of the property in question, or justify a decree giving a prior right to the appellee. It was not intended, by the statute, to give priority of right to the creditors who are not preferred. All that the appellee can claim, is to participate in such proceeds upon terms of equality with other creditors.

It results that the decree below is erroneous, so far as it

directs the property, rights and interests therein described to be sold in satisfaction, primarily, of the sums found by the decree to be due from Alexander White, Jr., to the appellee. The case should go to a master to ascertain the amount of all the debts owing by Alexander White, Jr., at the date of said conveyances, bill of sale and transfers. In respect to the amounts due from him to his mother, sisters, and brother, respectively, it is not necessary, at this time, to express any opinion, further than that the accounting in the Probate Court between them is not conclusive against the appellee. It will be for the Court below to determine, under all evidence, what amounts are justly due from Alexander White, Jr., to his mother, sisters and brother, taking into consideration all the circumstances attending his management of the property, formerly owned by his father, whether real or personal.

To the extent we have indicated, the decree is reversed, each side paying one-half the costs in this Court; and the cause is remanded, with a direction for further proceedings not inconsistent with this opinion.

The Chief Justice did not sit in this case, or participate in its decision.

The principal case establishes, that three things are forbidden to a man who is unable to go on in business: he may not convey, nor mortgage, nor confess judgment. If he contemplate continuance in business, then he may do any or all of these things, so long as he does not thereby prevent himself from, in fact, continuing his business.

The general principles upon which the judgment of the principal case was founded, were well declared by AGNEW, J., in *Miner's Nat'l Bank App.* (1868), 57 Pa. 193, 199: "So long as men manage their own affairs, and preserve the control of their property, it has been the policy of our laws to suffer them to deal with their estates, in the absence of fraud, as they find most conducive to their interests. * * * * This results, in the absence of bankrupt laws, from

that freedom of individual action which the genius of our institutions secures and concedes, as a measure of liberty belonging to the citizen, and necessary to the development of the greatest good of society."

"It supposes that while the debtor preserves control of his affairs in his own hands, the vigilance of creditors will be competent to protect their interests and to avert any injury."

"When a man can no longer go on in business, and what he has must pass into the liquidation of his debts, fairness requires that he should not dictate the course his property shall take. To permit it, is to afford an opportunity for the enemies of virtue to obtain preference, and to create prejudicial hostility."

And the contrary expressions in *Blakey's App.* (1848), 7 Pa. 449, and

Lea's App. (1848), 9 Id. 504, were held not to prevail over the true intent of the (Pa.) Voluntary Assignment Act. But, unfortunately, these cases have since been established as the law of Pennsylvania.

"The question presented is not whether an insolvent debtor may secure a creditor, but whether insolvent debtors may, by way of chattel mortgages, and assignments to certain creditors, as in the case before us, assign and transfer their entire property for the benefit of such creditors, with the intent of having one of such creditors, for himself and as agent and trustee for the others, take immediate possession, and convert the same into money, and then to divide the same *pro rata* among such favored creditors:" CASSODAY, J., *Winner v. Hoyt* (1886), 66 Wis. 227, 239.

The contrary view to that taken in the principal case is well expressed by TAYLOR, J., dissenting in the last mentioned case: "Under our statute, no creditor of an insolvent debtor has any preference over another, nor has he any right to demand that the debtor shall not prefer his other creditors to him, unless he voluntarily chooses to make an assignment for the benefit of all his creditors. The creditor has no power to compel a voluntary assignment, or an equal distribution of the assets of his debtor, in any case. * * * * If the writings in this case are an assignment in substance, it is so simply because the debtor has given all his assets to the preferred creditors. * * * * And why should not the same result follow, if the debtor suffers an execution upon a judgment obtained by one creditor, in the ordinary course of proceeding, of sufficient amount to sweep away all the assets to be levied?" (*Winner v. Hoyt* (1886), 66 Wis. 248, 251.)

Such statutes are to be liberally construed: see the principal case and the Illinois decisions there cited. And, as

a consequence, all courts recognize that there is no test of form. A conflict of decisions arises, however, on the lines of the two views of a debtor's right to prefer in payment, or the means of obtaining payment, without actual fraud.

The various decisions may be classified by States, and they in one of three divisions: (1) Where all preference is forbidden; (2) where preferences in the assignment are forbidden; and (3) where preferences are allowed.

Only the first of these three classes can be considered here.

The Alabama Code of 1887 provides, § 1737, page 419 (Code of 1876, § 2126): "Every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors, over the remaining creditors of the grantor, shall be and inure to the benefit of all the creditors of the grantor equally; but this section shall not apply to or embrace mortgages given to secure a debt contracted contemporaneously with the execution of the mortgage, and for the security of which the mortgage was given."

The last clause was added, by Act of February 23, 1883 (Laws, p. 189), to obviate the construction made in *Shirley v. Teal* (1880), 67 Ala. 449, and *Danner v. Brewer* (1881), 69 Id. 191; SOMERVILLE, J., *Wurten v. Matthews* (1885), 80 Id. 430.

Prior to the Code of 1876, preferences were permitted, and in forbidding such distinctions between creditors, the courts of that State hold that the application of this statute does not depend upon form or name, but a substantial transfer of all the property of the debtor, subject to the payment of his debts: *Danner & Co. v. Brewer & Co.* (1881), 59 Ala. 191, 199; *Ordway v. White* (1885), 80 Id. 245; *Collier v. Wood*, S. Ct. July 19, 1888. In these cases, the form of instrument adopted was that of a mortgage. But several papers might have

been used as unsuccessfully: *Danner v. Brewer*, *supra*, 200, citing *Holt v. Bancroft* (1857), 30 Id. 193.

The Arizona Rev. Stat., ed. 1887, Title iii. (act approved March 10, 1887), provide—"22. That every assignment, made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided, for a distribution of all his real and personal estate other than that which is, by law, exempt from execution, among all his creditors, in proportion to their respective claims, and however made, or expressed, shall have the effect aforesaid, and shall be construed to pass all such estate, whether specified therein or not, and every assignment shall be proved or acknowledged and certified and recorded in the same manner as is provided by law in conveyances of real estate or other property."

"24. Any debtor, desiring so to do, may make an assignment for the benefit of such of his creditors only, as will consent to accept their proportional share of his estate and discharge him from their respective claims, and, in such case, the benefits of the assignment shall be limited and restricted to the creditors consenting thereto; the debtor shall thereupon be and stand discharged from all further liability to such consenting creditors, on account of their respective claims, and, when paid, they shall execute and deliver to the assignee, for the debtor, a release therefrom."

"30. All property conveyed or transferred by the assignor, previous to and in contemplation of the assignment, with the intent or design to defeat, delay or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee, by the assignment, notwithstanding such transfer; and the assignee, or in case of his neglect or refusal, any creditor or creditors, may, in his name, upon securing such as-

signee against cost or liability, sue for, recover, collect and cause the same to be applied for the benefit of creditors, as other property, belonging to the debtor's estate in the hands of the assignee; but if it shall appear that the purchaser of any such property bought the same of the assignor, in good faith, and for a valuable consideration, and without reason to believe that the debtor was conveying or transferring the same, with the intent or design, as aforesaid, such purchaser shall be held to have acquired, as against the assignee, and creditors aforesaid, a good and valid title to such property."

"32. If any assignor shall secrete, or conceal, from his assignee, any portion of his property belonging to his estate, other than that which is exempt from execution, or shall, previous to, and in contemplation of, the assignment, transfer any property, with the intent or design to defraud his creditors, such assignor shall be adjudged guilty of a felony."

"38. Every mortgage, deed of trust, or other form of lien attempted to be given by the owner of any stock of goods, wares or merchandise, daily exposed to sale, in parcels, in the regular course of business of such merchandise, and contemplating a continuance of possession of said goods and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void."

"39. Any attempted preference, in the assignment, of one creditor, or creditors, of such assignor, shall be deemed fraudulent and without effect."

The Illinois statutes are quoted in the opinion of the principal case, and, in framework and detail, constitute a general Insolvent Law: *Hanchett v. Waterbury* (1885), 115 Ill. 220, 227 (per MULKEY, J.). They do not prescribe any form of assignment, and it is immaterial whether the preferences are men-

tioned or not; it is also immaterial how many instruments are used in the attempt to prefer: *Preston v. Spaulding* (1887), 120 Ill. 208, 218, where the Court said that "the principles here announced find support in the following authorities: *Berry v. Cutts* (1856), 42 Me. 445; *Holt v. Bancroft* (1857), 30 Ala. 193; *Kellogg v. Root* (1885), U. S. Circ. Ct. W. Dist. Mich., 23 Fed. Repr. 525; * * * see, also, *Burroughs v. Lehdorff* (1859), 8 Iowa 96; *Van Patten v. Marks* (1879), 52 Id. 518; *Perry v. Holden* (1839), 22 Pick. (Mass.) 269; *Livermore v. McNair* (1881), 34 N. J. Eq. 478; *Hahn v. Salmon* (1884), U. S. Circ. Ct., Dist. Ore., 20 Fed. Repr. 801; *Doggett v. Herman* (1883), U. S. Circ. Ct., Dist. Ore., 5 McCrary 269; *U. S. v. Griswold* (1881), U. S. Circ. Ct., Dist. Ore., 8 Fed. Repr. 496."

The importance of the principal case and of the Illinois decisions cannot be appreciated, if attention be not given to *Field v. Geohagan*, cited near the close of the opinion in the principal case. It establishes that the failing debtor's preference must not be in contemplation of discontinuing business: *Schroeder v. Walsh* (1887), 120 Ill. 403; *Hide & Leather Nat'l Bk. v. Rehm*, S. Ct. Ill., November 15, 1888.

The Iowa statutes provide (Rev. Code, ed. 1888, ch. 7, p. 777)—"§ 2115. No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid, unless it be made for the benefit of all his creditors, in proportion to the amount of their respective claims."

"§ 2116. In the case of an assignment of property for the benefit of all the creditors of the assignor, the assent of the creditors shall be presumed."

Under this statute, the courts of Iowa do not go to the extent of the decision in the principal case; for, in *Van Patten & Marks v. Burr* (1879), 52 Iowa

518, 522, the court distinguished their resolution (that a chattel mortgage and an assignment for the benefit of creditors, executed on the same day, and admitted in the pleadings to be one transaction, were void), from a prior decision, in *Lampson & Powers v. Arnold* (1865), 19 Iowa 479, where the insolvent, simultaneously with the execution of the assignment, paid certain debts by money, by transfer of promissory notes, and by conveyance of land. "The insolvent, as long as he retains the *jus disponendi* of his property, may appropriate it to the payment of his debts, and may prefer creditors. He may use all his property this way, or he may use a part and make a general assignment of the remainder. The payment and assignment cannot obviously be regarded as one transaction, and each will be valid. * * * But if, with the intention of disposing of all his property for the benefit of his creditors, he mortgages a part and assigns the remainder, these constitute one transaction": BECK, C. J., *Van Patten & Marks v. Burr* (1879), 52 Iowa 523. That is, a partial assignment is still valid: *Loomis v. Stewart*, S. Ct. October 6, 1888; *Moore v. Church* (1886), 70 Iowa 208, 211; *Garrett v. Burlington Plow Co.* (1886), Id. 697, 703; *Bowles v. Creighton* (1887), 73 Id. 199, 204, citing *Aulman v. Aulman* (1887), 71 Id. 124, and the second decision (upon the evidence), in *Van Patten v. Burr* (1880), 55 Id. 224. So, also, *Van Patten v. Thompson* (1887), 73 Id. 103; *Farwell v. Maxwell* (1888), U. S. Circ. Ct. S. Dist. Iowa, 34 Fed. Repr. 727; *Burrows v. Lehdorff* (1859), 8 Iowa 96.

Of course, in the absence of an intention to assign, a mortgage may be made; subject to attack for hindering creditors: *Kohn Bros. v. Clement* (1882), 58 Iowa 589; *Aulman v. Aulman*, *supra*. An interval of even one

hour, in the absence of contradictory proof, will not be too short to form an intention to assign: *Gage v. Parry* (1886), 69 Iowa 605, 610; *Farwell v. Maxwell*, *supra*.

The Kentucky General Statutes, (ed. 1887, ch. 44, art. 2, page 671), provide—
 “§ 1. Every sale, mortgage, or assignment, made by debtors, and every judgment suffered by any defendant, or any act or device, done or resorted to by a debtor, in contemplation of insolvency, and with the design to prefer one or more creditors, to the exclusion, in whole, or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors (except as hereinafter provided), in proportion to the amount of their respective demands, including those which are future and contingent; but nothing in this article shall vitiate or affect any mortgage, made in good faith, to secure any debt or liability, created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution.”

“§ 2. All such transfers as are herein declared to inure to the benefit of creditors generally, shall be subject to the control of courts of equity, upon the petition of any person interested, filed within six months after the mortgage, or transfer, is legally lodged for record, or the delivery of the property or effects transferred.”

In the construction of this statute, the intention of the debtor is the essential feature of each case. Payment by an insolvent will create a presumption of a design to prefer, but this presumption is not absolute: “it will not and ought not to prevail if the circumstances of the transaction show that no preference was intended”: *HOLT, J., Grimes v. Grimes*, Ct. App., January 7, 1888, citing *Hampton v. Morris* (1859),

2 Metc. (Ky.) 336, and *Thompson v. Heffner's Exrs.* (1875), 11 Bush. (Ky.) 353.

“While it is true, that neither the letter nor the spirit of the statute forbids a debtor from creating a debt in good faith, though he be in failing circumstances, and secure the debt by giving a mortgage on his property, simultaneously with the creation of the debt, which would hold good as against his creditors, yet, if a debtor, knowing that he is insolvent, and, in order to give a particular creditor a preference over other creditors, gives him a mortgage to secure a debt, or liability, already created, together with a liability simultaneously created, as was done in this case, and the creditor, knowing the true state of the case, as in this case, aids the arrangement, then he is not a mortgagee in good faith, to secure a debt, or liability, simultaneously created with the execution of the mortgage: *BENNETT, J., McCann v. Hill* (1887), 85 Ky. 574, 581. And so, when the purchasers of a lot of timber had advanced the purchase money to enable the insolvent to make delivery, by purchasing, felling and rafting the lumber, and the buyers were *bona fide* purchasers, such delivery was not a preference: *Vincent v. McAlpin*, Court of Appeals, June 16 and Sept. 13, 1888, citing *Napper v. Yager* (1881), 79 Ky. 241; *Southworth v. Casey* (1880), 78 Id. 395, and distinguishing *Fuqua v. Ferrell* (1882), 80 Id. 69. Likewise, a small payment, in the ordinary course of business, and without intent to prefer, would not be avoided as a preference, by an assignment a few days later: *Talbott's Assignee v. Ewalt*, Ct. App., March 1, 1888.

Maine and Maryland do not have a statutory system of assignments for the benefit of creditors, but only an Insolvent Law: *Rev. Stat. Maine*, ed. 1884, Title vi., chap. 70, page 572 sqq.—Code

of Maryland, ed. 1888, Art. 47; P. L. G. Art. 48.

Louisiana provides only for a state of insolvency, and does not recognize assignments: Rev. Civil Code, Title iv, chap. 3, section 7, § 2 (ed. 1888, p. 371 sqq.), and Rev. Stat. Laws, § 1781 sqq. (ed. 1876, p. 469 sqq.).

Massachusetts has an insolvent system (Pub. Stat. ed. 1882, chap. 157, pages 878, 892, sqq.), but has recently recognized a voluntary assignment, providing for distribution in substantial conformity with the insolvent law: Acts of 1887, ch. 340, p. 955. Prior to this latter statute, an assignment was repeatedly held to be valid only as against assenting creditors: *Faulkner v. Hyman* (1886), 142 Mass. 53. "This, for the reason that there was no adequate consideration unless with the assent of the creditors, without which no insolvent debtor should be allowed so to dispose of his property, as to place it beyond their reach": DEVENS, J., Id. 54.

The New York Revised Statutes provide, as respects moneyed corporations (ed. 1888, p. 1555, ch. xviii, Title 2A, chap. 8),—"§ 187. No such conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created, or security given by any such corporation, when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law; and every person receiving, by means of any such conveyance, assignment, transfer, lien, security or payment, any of the effects of the corporation, shall be bound to account therefore to its creditors or stockholders, or their trustees, as the case shall require; and whenever any incorporated company shall have refused the payment of any of its notes, or other evidences of debt, in specie or lawful money of the United States, it shall not be lawful for such

company, or any of its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and every such transfer and assignment to such officer or stockholder, shall be utterly void." Under this statute, the inquiry is confined to the two points of an actual (or contemplated) insolvency and a transfer of property: BARKER, J. *Kingley v. First Nat. Bk* (1884), 31 Hun. 335.

So, also, limited partnerships are restrained by Rev. Stat., ed. 1888, page 2495, Title I, chap. iv, part II), providing—"§ 20. Every sale, assignment, or transfer of any of the property or effects of such partnership, made by such partnership when insolvent, or in contemplation of insolvency, or after, or in contemplation, of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership, or insolvent partner, over other creditors of such partnership; and every judgment confessed, lien created, or security given, by such partnership, under the like circumstances, and with the like intent, shall be void, as against the creditors of such partnership."

"§ 21. Every such sale, assignment, or transfer of any of the property or effects of a general or special partner, made by such general or special partner, when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of the partnership, with the intent of giving any creditor of his own, or of the partnership, a preference over creditors of the partnership; and every judgment confessed, lien created, or security given, by any such partner, under the like circumstances, and with the like intent, shall be void, as against the creditors of the partnership."

Under this statute, if an assignment is

made with preferences, and afterwards another assignment without, the latter will be valid against subsequent attachments: *Schwartz v. Sautler*, Ct. App., Dec. 7, 1886.

It is uncertain whether this last section goes so far as to prevent a special partner from administering his individual property, for the benefit of his individual creditors: *ANDREWS, J., George v. Grant* (1884), 97 N. Y. 268; but it does not prevent a borrowing on mortgage, for the payment of individual debts. The mortgage does not create a preference, in such a case, and would only be affected by collusion between the parties, to defeat the statute: *Id.* 270.

Otherwise, an individual debtor, or a general partnership, about to stop business on account of insolvency, "has a legal right to transfer all of his property to one or more creditors, provided he does so in good faith, for its fair value, and with an honest intent to pay his debts": *RUGER, C. J., Williams v. Whedon* (1888), 109 N. Y. 337, where a surviving partner was allowed to assign with preferences. So in *Beste v. Burger* (1888), 110 Id. 644.

The Revised Statutes of New York (ch. v., Title I. A., ed. 1888, page 2542), provide in such case, that—"In all general assignments of the estates of debtors, for the benefit of creditors, hereafter made, any preference created therein (other than for wages or salaries of employees, under chapter 328 of the laws of 1884, and chapter 283 of the laws of 1886), shall not be valid, except to the amount of one-third in value of the assigned estate left, after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one-third of the assets of the assignor or assignors be insufficient to pay, in full, the preferred claims, to which, under the provisions of this section, the same are applicable, then said

assets shall be applied to the payment of the same, *pro rata*, to the amount of each said preferred claims": [Added by chap. 503, Laws 1887].

It has been thought that the doctrine of the principal case is also the law of New York, and *Sweetser v. Smith*, 22 Abb. N. C. 319; *Reisser v. Cohn*, Id. 312; *Third Nat'l Bank v. Clark*, Id. 312n; *Spelman v. Jaffrey*, Id. 315, and *Kessell v. Drucker*, all decided in 1889, are cited. But *Sweetser v. Smith* has been reversed by the General Term of the Supreme Court (51 Hun. 642), without any opinion, and the matter must remain in doubt, until a sufficient case reaches the Court of Appeals.

In the meantime, it may be recollected that an absolute bill of sale may be shown to amount, in law, to an assignment for the benefit of creditors: *Britton v. Lorenz* (1871), 45 N. Y. 51; *Brown v. Guthrie* (1888), 110 Id. 435, 441. This possibility required the Court, in the latter of the two cases just cited, to define "the material and essential characteristic of a general assignment" to be "the presence of a trust. The assignee buys nothing and pays nothing, but takes the title for the performance of trust duties." In this case, a debtor was allowed to mortgage a part of his property for \$2400; part of which sum was a debt due to the mortgagee; another part was a sum of money then loaned to the debtor; and the balance was to be paid by the mortgagee to certain named creditors of the debtor, so that the agreement did not leave to "the debtor," the right to dictate, after the transaction, what creditors should be paid. The mortgagee "became bound to pay them absolutely, out of his own means, and whether his security proved ample or insufficient. He held no part of the property in trust for the debtor, but solely as mortgagee, entitled to its proceeds till his debt was paid, and then bound to restore any surplus

realized, to the mortgagor, or those claiming under him. Such provision never hinders creditors, for they may pay the mortgage and take the property, or fasten on the surplus:" FINCH, J., *Brown v. Guthrie* (1888), 110 N. Y. 442.

The last cited case is worthy of note, still further, because the opinion expressly affirms *Brackett v. Harvey* (1883), 91 N. Y. 214, where the mortgagor was allowed to remain in possession and sell the mortgaged goods: the proceeds were applied to the reduction of the mortgage debt, and this removed any question of shielding the debtor. The decision was expressly put upon the doctrine of *Robinson v. Elliott* (1874), 22 Wall. (89 U. S.) 513, 523, and in affirmance of *Ford v. Williams* (1862), 24 N. Y. 359; *Conkling v. Shelly* (1863), 28 Id. 360; *Miller v. Lockwood* (1865), 32 Id. 293; *Frost v. Warren* (1870), 42 Id. 204; *Southard v. Benner* (1878), 72 Id. 424.

Hence, in *Fuller Electrical Co. v. Lewis* (decided March 2, 1886, mem. in 101 N. Y. 674, and reported in full in 5 North East. Repr. 437, and 2 Cent. Repr. 481), DANFORTH, J., said: "It is entirely well settled that a debtor may pay one creditor in preference to another, and, unless there is an intent, at the same time, to hinder, delay, or defraud other creditors, the one so favored may retain the fruits of that preference against their claims."

Further note should be made that an assignment is allowed when it conveys a part only of the assignor's property, for the benefit of selected creditors: *Knapp v. McGowan* (1884), 96 N. Y. 75, 85; though an insolvent must not thereby leave his unsecured creditors unprovided for, for no one, not even a solvent debtor, can so assign his property, with a provision for the return of the surplus to himself (which is the substance of an assignment), as to leave

no provision for the payment of all his debts: *Id.* 85.

Under these statutes, the courts of New York enquire also whether the assignment is made for a fraudulent purpose; "the provision of law, [Rev. Stat. ed. 1888, Title 3, chap. vii, page 2592], that every conveyance or assignment, made with intent to hinder, delay or defraud creditors, is void, is still in full force and operation, notwithstanding the act of 1858, and the various acts relating to voluntary assignments for the benefit of creditors": EARLE, J., *Loas v. Wilkinson* (1888), 110 N. Y. 209. So, *Talcott v. Hess* (1886), 4 N. Y. St. Rep. 62; *Nat'l Park B'k v. Whitmore* (1887), 104 N. Y. 297.

The Ohio Revised Statutes (ed. 1884, pp. 1332-4), provide—"§ 6343. All assignments in trust, to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors, in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter."

"§ 6344. All transfers, conveyances, or assignments, made by a debtor or procured by him to be made, with intent to hinder, delay or defraud creditors, shall be declared void, at the suit of any creditor; * * *."

"§ 3156. Every sale, assignment, or transfer of any of the property or effects of the [limited] partnership, made by it when insolvent, or in contemplation of insolvency, or after, or in contemplation of the insolvency of a partner, with the intent of giving a preference to a creditor of the partnership or insolvent partner, over other creditors of the partnership, and every judgment confessed, lien created, or security given by the

partnership, under like circumstances, and with the like intent, shall be void as against the creditors of the partnership."

The Supreme Court has very recently decided the case of *Rouse, trustee, v. The Merchant's National Bank*, June 18, 1889, holding that a corporation for profit, organized under the laws of this State, cannot, after it has become insolvent and ceased to prosecute the objects for which it was incorporated, create preference among its creditors, by giving mortgages to secure antecedent debts. The preference falls when followed by an assignment, unless some other consideration be given. This is in accordance with a decision of JACKSON, J. in the U. S. Circ. Ct., N. Dist. Ohio (*Iron City National Bank v. Fells*, 1886,), which went upon the ground that the assets of an insolvent corporation were a trust fund, for the creditors.

Whether an individual debtor or a partnership, might give preferences before executing an assignment, or without so doing, is uncertain, and a decision in some pending case is thought likely. In the meantime, it may be noted that a mortgage, to secure a *bona fide* indebtedness to his wife, may be executed by an insolvent to a trustee: *Hitesman v. Donnel* (1883), 40 Ohio 287. The mortgagee, being a trustee in this case, did not convert the mortgage into an assignment, solely because the wife could not, at law, be made the mortgagee, and, in equity, would require judicial aid. The case does proceed upon the ground that a mortgage may be made to any *bona fide* creditor, but does not touch the point of the amount of property mortgaged. A year later (1884), a mortgage valid against the mortgagor, but not against his creditors, was held not to be made a preferred lien, by expressly excepting it from the operation of the assignment subsequently made:

Blandy v. Benedict (1884), 42 Ohio 295, 298. The intention of the assignor was disregarded. Earlier still, while deciding that an assignment did not hinder, delay or defraud creditors, although it did prevent one creditor from obtaining preference by judgment, or other adverse process, BARTLEY, J., expressed the very principle upon which the Supreme Court of the United States proceeded, in the principal case: "When a man finds himself in failing circumstances, and unable to pay all his debts, he can do no act *more just and equitable*, [sic] than to surrender and assign his property, in trust, for the benefit of all his creditors:" *Hoffman et al. v. Mackall et al.* (1855), 5 Ohio 124, 133.

It is to be hoped that the Supreme Court will apply this honest principle to all cases of attempted preferences, and not stop at corporations.

Texas provides, Rev. Civil Code, 1888, page 65,— "ART. 65 *i.*, All property conveyed or transferred by the assignor, previous to and in contemplation of the assignment, with the intent or design to defeat, delay or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee by the assignment, notwithstanding such transfer; and the assignee, or in case of his neglect or refusal, any creditor or creditors may in his name, upon securing such assignee against cost or liability, sue for, recover, collect and cause the same to be applied for the benefit of creditors as other property belonging to the debtor's estate in the hands of the assignee; but if it shall appear in such action, that the purchaser of any such property bought the same of the assignor in good faith, and for a valuable consideration, and without any reason to believe that the debtor was conveying or transferring the same, with the intent or design aforesaid, such purchaser shall be held to have acquired, as against the assignee and cred-

itors aforesaid, a good and valid title to such property."

Under this statute, a mortgage is held to be valid when executed by an insolvent, who intended to make a voluntary assignment thereafter, if he could not effect a compromise with his other creditors: the words "bought" and "purchaser" receive an enlarged legal sense, and the mortgagee or vendee in good faith acquire a good title to the property: *Simmons Hardware Co. v. Kaufman*, S. Ct. April 24, 1888. And, in case of a mortgage, the value of the property is immaterial; the mortgages only have a lien and the excess is not placed beyond the reach of creditors: *Id.* These cases confirm the earlier decisions of *Jackson v. Harby* (1886), 65 Texas 710, 715 (S. C. 1888, 70 Id. 410); *Baldwin v. Peet* (1859), 22 Id. 708,

717, 718; *Watterman v. Silberberg* (1886), 67 Id. 100; *Scott v. McDaniel* (1887), Id. 315.

Payment in property may be made by an insolvent, but the creditor must not receive more property than enough to pay himself, and must not intend to do more than collect his debt: *Oppenheimer v. Halffe Bro.* (1887), 68 Texas 409, 412; *Smith v. Whitfield* (1886), 67 Id. 124; *Edwards v. Dickson* (1886), 66 Id. 613. This was attempted in the principal case and the Texas case should be considered in the light of the last clause of the Texas statute.

Washington Territory has an insolvent law, which concludes (Code, ed. 1881, p. 349): "§ 2052. No assignment of any insolvent debtor, otherwise than is provided in this chapter, shall be legal, or binding upon creditors."

JOHN B. UHLER

ABSTRACTS OF RECENT DECISIONS.

ACCIDENT INSURANCE.

External and visible signs, in a policy excepting "any bodily injury of which there be no external and visible signs upon the body of the injured," apply only to bodily injuries not resulting in death. *Paul v. Travelers' Ins. Co.*, Ct. App. N. Y., March 5, 1889.

Inhaling of gas, when excepted in a policy, does not apply to accidental death, caused by breathing, while asleep, the atmosphere of a room filled with illuminating gas. *Id.*

ATTORNEY-AT LAW.

Testimony, in an action by a creditor to set aside a deed as fraudulent, that, before the execution of the deed, the debtor consulted an attorney professionally and requested him to draw a deed of the property, saying that he did not want the title in his own name, because of his creditors, and that the deed and receipt for the consideration were drawn, but never executed, cannot be given by the attorney, being confidential communications between attorney and client. *Watson v. Young*, S. Ct. S. C., Feb. 13, 1889.

BAILMENT.

Slight care only is required on the part of a bailee, where the bailment is for the benefit of the bailor; such bailment must be founded on express contract, and requires the assent of the bailee to make him responsible, and he then can be held liable only for fraud or gross negligence. *Heatherington v. Richter*, S. Ct. App. W. Va., Dec. 14, 1888.

BILLS AND NOTES.

Collateral pledge of note constitutes between the indorser and indorsee the relation of pledgeor and pledgee, and, if such collateral paper matures before the principal debt, the duty and obligation of the pledgee in the collection thereof is performed by the exercise of reasonable and ordinary care and diligence; if the note is made payable at a particular bank, it is the duty of the pledgee to lodge it with such bank for collection. *Mt. Vernon Bridge Co. v. Knox Co. Sav. Bank*, S. Ct. Ohio, Jan. 29, 1889.

CORPORATIONS.

Agreement among stockholders, whose subscription to the capital stock has never been made public, entered into in good faith and before the corporation has incurred debts, whereby, instead of issuing stock to the amount of the original subscriptions, each subscriber is given full paid-up stock to the amount that he has actually paid on his subscription, is valid, as against creditors, and they cannot enforce the original subscriptions, except as to the deficiency between the amount of paid-up stock so issued, and the minimum allowed by the charter for the transaction of business. *Hill v. Silvey*, S. Ct. Ga., Feb. 1, 1889.

CRIMINAL LAW.

After commencement of trial for a misdemeanor, the court decided to try the prisoner upon another complaint, and discharged him; this action barred another trial for the same offence. Commonwealth v. Hart, S. Jud. Ct. Mass., March 1, 1889.

DEED.

Alteration of deed by grantee, before registration, by erasing his own name, wherever it occurs, and inserting that of his wife, without the knowledge of the grantor, renders the deed inoperative, and the title remains in the grantor. Respass v. Jones, S. Ct. N. C., Feb. 18, 1889.

Ancient deed may be challenged on the ground of forgery. Parker v. Waycross & F. R. R. Co., S. Ct. Ga., Feb. 20, 1889.

DOMICILE.

Alleged lunatic, pending proceedings for the appointment of a guardian, can, if mentally capable, change his domicile to another State, though the guardianship resulting from the proceedings continues until his death, and the courts of the new domicile have original probate jurisdiction of his estate. Talbot v. Chamberlain, S. Jud. Ct. Mass., March 11, 1889.

DONATIO CAUSA MORTIS.

Delivery, either of the articles given or of the means of obtaining them, is essential to the validity of a gift, and it makes no difference that, subsequently to the time of the alleged gift, the donor declared to a third party that he had given the articles in question to the claimant, nor that his administrator acknowledged that such gift had been made. Yancey v. Field, S. Ct. App. Va., Feb. 14, 1889.

FIRE INSURANCE.

Agent, authorized to procure policies of insurance and forward applications for acceptance to the company, must be deemed the agent of the company in all that he does in preparing the application, and in any representation he may make as to the character or effect of the statements therein contained; this rule is not changed by a stipulation in the policy subsequently issued, that the acts of such agent in making out the application shall be deemed the acts of the assured. Deitz v. Providence-Washington Ins. Co., S. Ct. App. W. Va., Dec. 14, 1888.

JURISDICTION.

Injunction will not be granted by a Massachusetts court to enjoin a citizen of that State from prosecuting a suit in a State court of South Carolina to foreclose a mortgage of land situated in the latter State, by reason of the fact that the Supreme Court of South Carolina, as indicated by previous rulings in the case, entertains views of the law governing the rights of the parties, which differ from

those held by the Supreme Court of the United States, as indicated by its previous rulings in the case. *Carson v. Dunham*, S. Jud. Ct. Mass., March 5, 1889.

LIFE INSURANCE.

Wife and Children of the insured were the beneficiaries of a life policy, which, after the death of his wife, the insured surrendered, taking in its place another policy payable in the same manner; he never married again and but one child survived him; the fund arising from the policy was not liable for the debts of the insured, and was payable to the surviving child and the administrator of the deceased one, the provision for the wife being a nullity. *Hooker v. Sugg*, S. Ct. N. C., Feb. 26, 1889.

LIMITATION.

Stock Subscriptions are not subject to the running of the statute, until called in, and where a corporation assigns for the benefit of creditors, the statute does not begin to run against the stockholders' liability, until the court of chancery makes a call. *Glenn v. Howard*, S. Ct. Ga., Jan. 28, 1889.

MORTGAGE.

Proceeds of foreclosure sale under a mortgage, given to secure two notes of the mortgagor, with different sureties, should be applied to the payment of both notes *pro rata*; the right of a creditor to apply a payment made by his debtor applies only to voluntary payments and not to money received from a judicial sale. *Orleans Co. Nat. Bank v. Moore*, Ct. App. N. Y., March 5, 1889.

PARTNERSHIP.

Scaled instrument, executed in the firm name by one partner only, does not bind the firm, though executed in a State where, by statute, specialties are negotiable by indorsement. *Hull v. Young*, S. Ct. S. C., Feb. 9, 1889.

RAILROADS.

Depot grounds are under the same complete and exclusive dominion of a railroad corporation as that which is exercised by every individual over his own property; the corporation may exclude or admit whom it pleases, when they come to transact their own private business with passengers or other third persons; and this rule applies to persons selling lunches or soliciting orders from passengers for the sale of lunches, no matter how long such privilege may have been enjoyed, without objection by the corporation. *Fluker v. Georgia R. R. & Banking Co.*, S. Ct. Ga., Jan. 21, 1889.

Recovery for fire, alleged to have been started by a locomotive, cannot be had, where experts testify that the locomotive was new, of the best make and with the best appliances, and that the spark-arrester was the best in use and in perfect order; and other witnesses testify that the fire did not start on the railroad company's

right of way and that there were no combustible substances thereon; the claimant's witnesses, who saw the fire, did not contradict these witnesses, and two of them testified that the fire started on adjoining land, in a cluster of bushes. *Bernard v. Richmond F. & P. R. R. Co.*, S. Ct. App. Va., Feb. 21, 1889.

Ticket of firm, given by a railroad company under a contract, the consideration of which was "a ticket, entitling either one of said firm, but only one on any train, to occupy one seat, and travel on the passenger trains of said railroad company," must be presented whenever any one of the firm takes passage on a train of the company. *Knopf v. Richmond F. & P. R. R. Co.*, S. Ct. App. Va., Feb. 21, 1889.

USURY.

Stipulation for interest on semi annual payments of interest on a promissory note, if not paid when due, does not render the contract usurious. *Taylor v. Hiestand*, S. Ct. Ohio, Feb. 26, 1889.

WILLS.

Testamentary capacity is not shown, where the alleged will was made five days before testator's death, while he was very ill, being sometimes unconscious; the dispositions were unjust and unnatural, some of his children—an infant among them—being unprovided for, and his wife being given a pittance only; the draughtsman, who was named as executor and was the proponent, though living near the testator, was not respected by him, while in health; the proponent testified that he wrote the will according to testator's direction, previously received, and took it with the subscribing witnesses, one of whom he himself suggested, to testator's house; upon going to testator, proponent thought him dying, but afterwards discovered that he was asleep; when he awakened the others went out, whereupon proponent read the will to him loudly, asking at the end of each clause if it was right, to which he assented; the witnesses were then brought in, and testator, in answer to a question from proponent, said that it was his will, and he desired the witnesses to sign it, whereupon proponent raised him up, and one of the witnesses guided his hand and assisted him in signing; after the witnesses had signed, testator requested proponent to keep the will; the witnesses testified that they heard the reading of the will in part, and the questions of proponent, but not testator's answers; while in the room testator did not speak to them, nor recognize them; when asked if it was his will, he only nodded, and spoke but once, which was to ask for water; neither proponent nor the witnesses were related to the testator or his family. *Tucker v. Sandidge*, S. Ct. App. Va., Dec. 13, 1888.

JAMES C. SELLERS.

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STATUTORY LIABILITY FOR CAUSING DEATH.

The question regarding the right to maintain an action, independently of statute, for damages, for causing the death of a person, may be considered as finally set at rest, since the decisions of the United States Supreme Court in *Insurance Company v. Brame* (1877), 95 U. S. 754, holding, in accordance with the English decisions and the almost uniform decisions of our own courts, that such an action is not maintainable at law, and in the case of *The Harrisburg* (1886), 119 U. S. 199, holding the rule to be the same in admiralty. We may reasonably expect that that question will not be much mooted hereafter. But in place of it, Lord Campbell's Act, and our various State statutes modeled upon it, which have been designed to supply the defect of the common law, have raised not one, but many difficult questions, which seem likely to prove an inexhaustible source of litigation.

The principal questions raised, and those which alone we propose to inquire about, involve, if they are not always considered to turn upon, the nature of the right conferred, or intended to be conferred, by the Act. Does it give an entirely new right of action, or merely provide for the survival of the right of action for injury to the person, which at common law does not survive?

Blake v. Midland R'y Co., 18 Q. B. 93, a leading English case decided in 1852, involved the question of the measure of damages under the Act, and it was held (the action being by an

administratrix, who was also the widow of the deceased), that the jury should not be allowed to take into consideration the mental sufferings or bereavement of the plaintiff for the loss of her husband, but must give compensation for pecuniary loss only. Mr. Justice COLERIDGE said therein :

The title of this Act may be some guide to its meaning; and it is "An Act for compensating the families of persons killed," not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly-given action may be maintained, although death has ensued; the argument being that the party injured, if he had recovered, would have been entitled to a solatium, and therefore so shall his representatives on his death. But it will be evident that this Act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles. Section Two enacts that "in every such action, the jury may give such damages as they may think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought." The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family.

In *Franklin v. Southeastern R'y Co.* (1858), 3 H. & N. 211, and in *Dalton v. Same* (1858), 4 C. B. (N.S.) 296, suits were maintained on account of the death of sons, for the benefit of parents, and damages allowed to be assessed on the basis of reasonable expectation on the part of the latter, of pecuniary benefit to be derived from the continuance of their sons' lives; but in the latter case the expenses of funeral and mourning were disallowed, Mr. Justice WILLES saying, that "the subject matter of the statute is compensation for injury by reason of the relative not being alive."

It has been held, too, in England, that some actual damage must be shown, or the action cannot be maintained; that the recovery of nominal damages is not permissible: *Duckworth v. Johnson* (1859), 4 H. & N. 653; *Boulter v. Webster* (1865), 13 W. R. 289; s. c., 11 L. T. (N. S.) 598.

In *Pym v. Great Northern R'y Co.* (1862), 2 B. & S. 759; affirmed in the Exchequer Chamber (1863), 4 B. & S. 396, it was held that damages were recoverable on account of a change in the mode of distribution of property among the members of a family, produced by the death complained of, although no pecuniary loss to the family, in the aggregate, would result. COCKBURN, C. J., said, in his opinion in the lower court :

It was contended that, inasmuch as if death had not ensued from the effects of the accident, the deceased could have had no right of action against the company, in respect of a pecuniary loss arising only on his death, this action could not be maintained by his representative, inasmuch as the right of action is given only

where the deceased could have maintained an action, if death had not ensued. We were at first struck by this argument, but on consideration we are of opinion that the condition that the action could have been maintained by the deceased, if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect or default complained of. Thus, if the deceased had, by his own negligence, materially contributed to the accident whereby he lost his life, as he, if still living, could not have an action in respect of any bodily injury, notwithstanding there might have been negligence on the part of the defendants, the present action could not have been supported. But supposing the circumstances of the negligence to have been such that, if death had not ensued, the deceased might have brought his action in respect of any injury arising to him from it, we are of opinion that his representative may maintain an action in respect of an injury arising from a pecuniary loss occasioned by the death, although that pecuniary loss would not have resulted from the accident to the deceased, had he lived.

Although the statute, and these decisions applying it, make the injury resulting to third parties from the death, the sole ground of recovery; excluding from the computation of damages the loss or suffering of the deceased; and notwithstanding the language of the court in *Blake v. Midland Railway Company* (1852), 18 Q. B. 93, to the effect that the Act does not transfer the decedent's right of action to his representative, but gives a totally new right of action; the Court of Queen's Bench (in which also the latter case arose), held in *Read v. Great Eastern R'y Co.* (1868), L. R. 3 Q. B. 555, that a settlement made by the decedent in his lifetime, with the company responsible for the injury, was a bar to an action under the statute, after his death. None of the judges constituting the court when *Blake v. Midland R'y Co.*, *supra*, was decided, were on the bench at this time. The language of Justices BLACKBURN and LUSH, who alone delivered opinions, indicates quite a different theory of the statute, from that advanced in the cases heretofore cited, and deserves attention. Said Mr. Justice BLACKBURN:

Before that statute, the person who received a personal injury and survived its consequences, could bring an action and recover damages for the injury, but, if he died from its effects, then no action could be brought. To meet this state of the law, the 9 & 10 Vict. c. 73, was passed, and whenever the death of a person is caused by a wrongful act, and the act is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured. Here, taking the plea to be true, the

party injured could not maintain an action in respect thereof, because he had already received satisfaction. Then comes section two, which regulates the amount of damages and provides for its apportionment in a manner different to that which would have been awarded to a man in his lifetime. This section may provide a new principle as to the assessment of damages, but it does not give any new right of action. Mr. *Codd* was driven to argue that the executor could bring a fresh action, even if the deceased had recovered damages in an action; but to hold this would be to strain the words of the section. The intention of the enactment was, that the death of the person injured should not free the wrong-doer from an action, and in those cases where the person injured could maintain an action his personal representative might sue.

Mr. Justice LUSH said :

The intention of the statute is not to make the wrong-doer pay damages twice for the same wrongful act, but to enable the representatives of the person injured, to recover in a case where the maxim, *actio personalis moritur cum persona*, would have applied. It only points to a case where the party injured has not received compensation against the wrong-doer. It is true, section two provides a different mode of assessing damages, but that does not give a fresh cause of action.

Barnett v. Lucas (1872), Irish Rep. 6 C. L. 247, was an action by a widow, as administratrix of her husband, to recover for damage to personal property of the intestate, caused by the explosion of a boiler supplied by the defendants. The intestate had himself been killed by the explosion and the plaintiff had, in a former action, recovered for his death. It was held by the majority of the court of the Irish exchequer chamber that such recovery was no bar to this action, on the ground that the statute gives a new right of action, as decided in *Blake v. Midland Ry Co.* (1852), 18 Q. B. 93, and *Pym v. Great Northern Ry Co.* (1862), 2 B. & S. 759, although it may be, as held in *Read v. Great Eastern Ry Co.* (1868), L. R. 3 Q. B. 555, that two actions cannot be brought for the same injury to the person.

FITZGERALD, B., dissented, holding that damages could not, by reason of the statute, be twice recovered in respect to the same wrongful act, relying on the last named case; and saying, with regard to the statement, that the Act gives a totally new right of action, that, while that is true in a sense, "this new right is given by preserving the cause of action which was in the deceased, so as to be available, notwithstanding the death."

Notwithstanding the well settled principle of the common law, that an action for tort to the person dies with the person

and will not survive to the representatives of the injured party, it was held in 1875, in *Bradshaw v. Lancashire & Yorkshire Ry Co.* (1875), L. R. 10 C. P. 189, that the right of action for pecuniary injury, consequent upon injury to the person, that is, the expense of medical aid and the injury to the person's business resulting from his being disabled from attending to it, will survive; the latter being regarded as separable from the personal injury, that is, the bodily pain and suffering. It was also held that this principle was not affected by Lord Campbell's Act, and that an executrix could maintain an action to recover for the pecuniary damage resulting to her testator from a personal injury, or, as it was termed, the damage to his personal estate, notwithstanding his death resulted from the injury. The defendant in the action was a common carrier, on whose road the testator was riding as a passenger when the injury was received, and the action was brought in contract.

Said Mr. Justice GROVE:

Does the fact that in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact that provision has been made in such cases for compensation in respect of the death to certain relatives, by Lord Campbell's Act, take away any right of action that the executrix would have had but for the Act? It does not seem to me that the Act has that effect, either expressly or by necessary implication. The intention of the Act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action, he sues as legal owner of the general personal estate, which has descended to him in course of law; under the Act he sues as trustee, in respect of a different right altogether, on behalf of particular persons designated in the Act.

The following year, 1876, a case arose in the Queen's Bench (*Leggott v. Great Northern Ry Co.*, 1 Q. B. Div. 599), where an administratrix brought an action like that in *Bradshaw v. Lancashire & Yorkshire Ry Co.* (1875), L. R. 10 C. P. 189, after a prior suit and recovery under Lord Campbell's Act. As to the survival of the right of action for pecuniary loss suffered by the intestate in his life-time as a result of the personal injury, the judges felt bound by the last named case, though they doubted the correctness of the decision. It was assumed,

apparently, that the prior suit and recovery were no bar to the present action (though whether some question might not have been made on that point, as in the Bradshaw case, there appears to have been no prior recovery), and it was claimed by the plaintiff that the finding of negligence, etc., on the part of the defendant in the prior suit, estopped it to deny such negligence, etc., in this suit. The plaintiff's contention was overruled, on the ground that the two actions were not brought by the administratrix in the same right, Mr. Justice MELLOR saying :

It seems that though nominally, the machinery of the action in the one case is the same as the machinery in the other, yet the action in which the verdict has been recovered, was an action of a very special and limited description. It was an action given expressly by the statute, and must be confined within the limits of the statute. It was to provide for what the law had not before provided for, namely, the right of an administrator or executor to sue for the benefit of the family, in respect of the death of the deceased, occasioned by the negligence of other persons. * * * It is to be observed that the executrix, in a case under the Act, does not sue in respect of anything which belonged to the deceased, but by force of the statute, which enacts that the deceased's death is to be made the subject of an action, just as if he had lived ;

and Mr. Justice QUAIN saying :

Lord Campbell's Act enables an action to be brought in a case where it could not have been brought before that Act, namely, when the man has suffered a personal injury, and dies in consequence. After his death, before Lord Campbell's Act, no such action could have been maintained, because the death destroyed it. It fell with the life of the individual injured. Now Lord Campbell's Act gives an entirely new action, not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased.

As to the correctness or incorrectness of the holding in the Bradshaw case, as to the survival of a right of action for pecuniary loss, distinct from the personal injury, we need not concern ourselves ; but, independently of that question, the Bradshaw and Leggott cases and *Barnett v. Lucas* (1872), Irish Rep. 6 C. L. 247, have an important bearing on the question as to the true theory of Lord Campbell's Act. They certainly all favor the view that the right of action given by the Act, is a new right and not merely a continuance in the personal representatives of a right vested in the decedent in his lifetime.

It may be thought that the statute was not necessarily in-

volved in *Barnett v. Lucas* (1872), Irish Rep. 6 C. L. 247, as a recovery was only sought therein for damage done to personal property, and that the decision must have been the same, whatever view was entertained regarding it; but the fact that one of the judges who differed from the others in his views regarding Lord Campbell's Act, dissented also from their conclusions, perhaps disposes of this suggestion. At least, it shows in a pointed manner, that the question which we are investigating, was supposed to be necessarily involved, and gives corresponding weight to the decision of the majority of the Court, who would naturally have taken narrower ground, and so have avoided the troublesome question on which the dissenting members differed from them, if it had been, in their view, possible to so dispose of the case. The *Barnett*, *Bradshaw* and *Leggott* cases may be said to establish, that rights which would otherwise survive to the personal representatives of an injured person, are not cut off or merged, in case death ensues from the injury, and a consequent right of action arises under Lord Campbell's Act. It will be important to recall this, in connection with certain American cases, to be considered presently, and arising in States where Acts of two descriptions existed: one simply providing for the survival of rights of action for injury to the person, and thus in terms repealing the common law doctrine on that subject; the other modeled after Lord Campbell's Act.

Statutes resembling more or less closely Lord Campbell's Act, have been enacted in most of our States and Territories, and it has been almost uniformly held that the damages recoverable under them are exclusive of any loss or damage to the injured party during his life, and include only the loss caused, to the persons specified by the Act, by his death. (See cases cited in 2 Thompson on Negligence, p. 1289, §90; Cooley on Torts, *271.) It has sometimes been held, too, and it serves to emphasize the last point, that the declaration must allege that the deceased left a widow, husband, or next of kin surviving him or her. (See 2 Thompson on Negligence, p. 1287, §89.)

In an early New York case of the latter character, (*Safford v. Drew*, 3 Duer (N. Y.), 627, decided in 1854, it was said in the opinion, that the damages are "not given for a cause of action,

which by force of the statute survives the death, but entirely for a new cause which the death itself originates": per DUER, J., p. 633. An Illinois case, decided a few years later, *Chicago v. Major* (1857), 18 Ill. 349, involved the question of damages generally, and the question was raised whether the death of one leaving next of kin, but not leaving a widow, was actionable, the statute making the damages recoverable for the benefit of widow and next of kin. The latter point was resolved in the affirmative; but the Court said, "This is a new cause of action given by this statute and unknown to the common law." In a later Illinois case (*Chicago & Rock Is. R. R. Co. v. Morris* (1861), 26 Ill. 400, holding a complaint defective, even after verdict, for not alleging that deceased left a widow or next of kin surviving him, the Court said:

The statute evidently intends to give no damages for the injury received by the deceased, but refers wholly to the pecuniary loss which his wife and next of kin may be proved to have sustained, and the damages are not assets, to be applied to the general necessities of the estate, but belong exclusively to the widow and next of kin, to whom they are to be distributed. The statute makes this pecuniary loss, the sole measure of damages. The satisfaction of that loss is, therefore, the sole purpose for which an action can be instituted, there being nothing to be allowed for the bereavement, for *solatium*. This being so, the facts that there are persons entitled by law to claim this indemnity, and that they have sustained a loss justifying their claim, must be proved * * * and therefore must be averred. * * * We are satisfied there is no right of action under this statute, except upon the basis of a pecuniary damage sustained by the widow and next of kin of the deceased, [and cited approvingly *Safford v. Drew* and *Chicago v. Major*, just referred to, and the English case of *Blake v. Midland R'y Co.*]

In *Quincy Coal Co. v. Hood*, 77 Ill. 68, decided in 1875, the same Court went so far as to hold, that when the complaint only alleged the existence of a father of the deceased, it could not be shown that other relatives, viz., a mother, brothers, and sisters, also survived him.

Said Mr. Justice HOAR, in a Massachusetts case, decided in 1867 (*Richardson v. N. Y. Central R. R. Co.*, 98 Mass. 85): "It is not the injury to the deceased which is to be estimated at all." It is generally held in this country, contrary to the English cases which we have cited, that, where there is a widow or next of kin surviving, nominal damages may be recovered, although no substantial pecuniary loss to them be shown: 2 Thompson on Negligence, p. 1293. In *Dickens v. N. Y. Cen-*

tral R. R. Co. (1858), 28 Barb. (N. Y.) 41, it was held, that an action was maintainable by the representatives of a married woman, and it was said that the damages are not limited to the pecuniary loss, the word "may" being used in the statute: See *Dimmey v. R. R. Co.* (1885), 27 W. Va. 32, and cases there cited to the same effect.

In Tennessee, under a statute which provides that—

The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act or omission of another, would have had against the wrong-doer, in case death had not ensued, shall not abate or be extinguished by his death; but shall pass to his personal representatives, for the benefit of his widow and next of kin, free from the claims of his creditors.

It was held that those damages were recoverable which the injured person could himself have recovered if he had lived: *Louisville & Nashville R. R. Co. v. Burke* (1868), 6 Cold. (Tenn.) 45; *Nashville & C. R. R. Co. v. Prince* (1871), 2 Heisk. (Tenn.) 580. In the former of these two cases, it was held that only such damages were recoverable; in the latter, that damages resulting to third persons from the death, were also recoverable. These Tennessee cases have no significance in respect to the subject under discussion, as they merely involve the construction of a peculiar statute, which is unlike Lord Campbell's Act. The statement alluded to, as contained in the case in Barbour, is not supported by any other authority. It has always been assumed, when not expressly decided, that the damages which the statute provides the jury "may" give, include all which they can be allowed to give.

It is said in Cooley on Torts (p. 264), that "a question has also been made in some States, whether suit could be maintained where the death was instantaneous; and in Massachusetts, under a somewhat nice and technical construction of the statute, it was decided that the action would not lie in such a case. But, probably, under no existing statute would it be so held now." With all respect for the learned author, it is submitted that this criticism of the Massachusetts case cited by him is not well founded.

That case (*Kearney Adm'r v. Boston & Worcester R. R. Co.* (1851), 9 Cush. (Mass.) 108, did not involve the construction

of an act like Lord Campbell's Act, but, as appears by a note to the second edition of Judge Cooley's work, of a statute merely providing, in so many words, for the survival of rights of action for injury to the person. The Court held that no action was maintainable by the administrator under *such* a statute, where the injury complained of produced instant death, because in such case, no right of action vested in the injured person so as to pass to his representatives.

"The statute," said Chief Justice SHAW, "supposes the party deceased to have been once entitled to bring an action for damages for the injury. * * * A distinction is to be taken between cases thus brought by executors and administrators of the person injured, and cases where persons sue who claim that their own rights have been infringed."

This decision has been affirmed again and again, in Massachusetts, and the doctrine laid down is well settled law there; the principal controversy in the subsequent cases has been as to in what cases the death is to be considered immediate, so as to prevent the vesting of a right of action, and as to the right to recover substantial damages where the injured person, though surviving the accident for a short period, remains unconscious until death: *Hollenbeck v. Berkshire R. R. Co.* (1852), 9 Cush. (Mass.) 478; *Bancroft v. Boston & Worcester R. R. Co.* (1865), 11 Allen (Mass.) 34; *Moran v. Hollings* (1878), 125 Mass. 93; *Kennedy v. Standard Sugar Refinery* (1878), 125 Id. 90; *Corcoran v. Boston & Albany R. R. Co.* (1882), 133 Id. 507; *Tully v. Fitchburg R. R. Co.* (1883), 134 Id. 499; *Riley v. Connecticut River R. R. Co.* (1883), 135 Id. 292; see note to second edition of Cooley on Torts, *265; *Nourse v. Packard* (1885), 138 Id. 307; *Mulchahey v. Washburn Car Wheel Co.* (1887), 145 Id. 281.

So, it would certainly be absurd to hold that Lord Campbell's Act does not apply to cases of instantaneous death, and the Massachusetts court has not committed that absurdity. Until recently there has been no statute in Massachusetts, giving a right of action, such as is given by Lord Campbell's Act, but there has long been an act giving a similar remedy, in a limited class of cases; except that it is pursued by indictment, instead of by private action. The defendant, under the proceeding described, is mulcted in damages, if found guilty, and the damages are distributed to the relatives, as if recovered by

civil suit. It has never been claimed that this statute does not apply to cases of instantaneous death, but it has been claimed, both with regard to this Massachusetts statute and a similar one in Maine, that they apply *only* to cases of instantaneous death; a much more reasonable contention. That position was sustained by the Maine, though not by the Massachusetts court: *Commonwealth v. Metropolitan R. R. Co.* (1871), 107 Mass. 236; *State v. Maine Central R. R. Co.* (1872), 60 Me. 490; *State v. Grand Trunk R'y* (1873), 61 Id. 114. The argument, in those cases, for limiting the application of the statute, to cases of instant death, was, that in case the injured person survived the accident, a right of action would vest in him, which, by virtue of the statute making injuries to the person survive (Maine as well as Massachusetts has such an act), would pass to his personal representative, and that a double remedy should not be allowed. The Massachusetts' court (per COLT, J.), answered this argument as follows—

A common law action, surviving under the statute to the administrator, and an indictment under the statute, do not cover the same ground. In the former, damages for the personal injury to the deceased are alone recovered; in the latter, the purpose is to secure to the relatives some compensation for the loss to them, as well as to inflict some punishment for the offence. In one, damages are recovered, which in due settlement of the estate may never come to the relatives. * * * It is not important to consider now what effect, if any, proof of a judgment in a civil action, or a settlement with the party injured, or his representatives, would have upon the prosecution of an indictment for the same act of negligence.

Taking the opposite view, the Maine court said, through Mr. Justice WALTON, in the first-named Maine case—

If he does not die immediately, a right of action accrues to him which will survive to his personal representatives, and no other remedy is needed: R. S., C. 87, § 8. But, if he does die immediately, no right of action will accrue to him, and of course none will survive to his heirs, or to his personal representatives for their benefit. * * * We think the remedy, by indictment, was intended to apply to the latter class of cases alone. To hold otherwise would involve the Legislature in the absurdity of creating two independent, and to some extent conflicting, remedies for one and the same injury. We think the remedy, by indictment, was intended to apply to a class of cases where none would otherwise exist. * * * The remedy by indictment ends where the remedy by civil suit begins. Thus construed, the statutes are in harmony and the absurdity of supposing that the Legislature intended to create two independent and conflicting remedies, for one and the same injury, is avoided.

The Massachusetts decision, which was made the year previous to the case in Maine, was cited before the Maine court, but it was thought that the construction given to the statute in Massachusetts went on the ground of the purpose of the Massachusetts statute being penal. The criticism of the Massachusetts case of *Kearney v. Boston & Worcester R. R. Co.*, just quoted, is obviously the result of identifying an act, which merely provides for the survival of the right of action for injuries to the person, with acts like Lord Campbell's Act, and proceeds upon the theory that the latter act merely continues a right of action vested in the decedent, and does not create a new right of action. That is Judge Cooley's theory of the statute. (Cooley on Torts, p. 264.) It is quite evident, however, both from the condition of the statute law and the decisions cited, that the Massachusetts court (and this is true even in a greater degree of the Maine court), does not recognize any such identity.

CHARLES R. DARLING.

Madison, Wis.

(To be continued.)

STATUTES RELATING TO TELEPHONES.

(Continued.)

Pennsylvania has provided for the incorporation and regulation of telephone companies, in general terms, by a supplement to the General Corporation Act of 1874, approved May 1, 1876 (P. L. 90)—

SEC. 1. *Be it enacted, etc.*, That corporations of the second class may be formed and created in the manner provided for by the act to which this is a supplement, and with all the rights and powers therein granted, for the purpose of constructing, maintaining, and leasing lines of telegraph for the private use of individuals, firms, corporations, municipal and otherwise, for general business, and for police, fire alarm or messenger business, or for the transaction of any business in which electricity, over or through wires, may be applied to any useful purpose.

SEC. 2. The business of such corporation may be wholly within, or partly within and partly without the limits of any city, borough, or township in this State, or partly in any other State or States.

SEC. 3. That in lieu of the requirements of the first paragraph of the thirty-third section of the act to which this is supplementary, approved April twenty-ninth, one thousand eight hundred and seventy-four, the charter for the incorporation of companies under the provisions of this act shall state: *First*, In what counties in this State it is proposed to carry on business; *Second*, In what other States it is proposed to carry on business.

The fourth section of this supplementary act was amended by Act approved June 25, 1885 (P. L. 164), so as to read—

SEC. 4. That before the exercise of any of the powers given under this act, application shall first be made to the municipal authorities of the city, town, or borough, in which it is proposed to exercise said powers, for permission to erect poles, or run wires on the same or over, or under any of the streets, lanes, or alleys of said city, town or borough, which permission shall be given by ordinance only, and may impose such conditions and regulations as the municipal authorities may deem necessary.

Prescriptive rights had been previously regulated, by Act approved April 19, 1883 (P. L. 13), entitled—

An Act respecting telegraph, telephone, electric light and other wires and cables for electric purposes.

SEC. 1. *Be it enacted, etc.,* That, whenever any wire or cable, used for any telegraph, telephone, electric light, or other wire, or cable for electric purposes, is, or shall be, attached to, or does, or shall, extend upon, or over, any building or land, no lapse of time whatsoever shall raise a presumption, or justify a prescription, of any perpetual right, to such attachment or extension.

“A further Supplement” to the Revenue Act of 1879, approved June 1, 1889 (P. L. —), provides—

SEC. 23. That every railroad company, pipe-line company, conduit company, steamboat company, canal company, slack water navigation company, transportation company, street passenger railroad company, and every other company, joint stock association or limited partnership, now or hereafter incorporated, or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other State, or by the United States, or any foreign government, and doing business in this Commonwealth, and owning, operating, or leasing to or from another corporation, company, association, joint stock association, or limited partnership, any railroad, pipe-line, slack water navigation, street railway, canal, or other device for the transportation of freight, or passengers, or oil, and every telephone or telegraph company, incorporated under the laws of this, or any other State, or of the United States, and doing business in this Commonwealth, and every express company, incorporated or unincorporated, doing business in this Commonwealth, and every firm, co-partnership, or joint stock company, or association, doing business in this Commonwealth, and every electric light company, and every palace car and sleeping car company, incorporated or unincorporated, doing business in this Commonwealth, shall pay to the State Treasurer, a tax of eight mills upon the dollar upon the gross receipts of said corporation, company, or association, limited partnership, firm, or co-partnership, received from passengers and freight traffic, transported wholly within this State, and from telegraph, telephone, or express business, done wholly within this State, or from business of electric light companies, and from the transportation of oil, done wholly within the State; the said tax shall be paid semi-annually, upon the last days of January and July in each year; and, for the purpose of ascertaining the amount of the same, it shall be the

duty of the treasurer, or other proper officer of the said company, firm, co-partnership, limited partnership, joint stock association, or corporation, to transmit to the Auditor-General a statement, under oath or affirmation, of the amount of gross receipts of said companies, co-partnerships, corporations, joint stock associations, or limited partnerships, derived from all sources, and of gross receipts from business done wholly within the State during the preceding six months ending on the first days of January and July in each year, and if any such company, firm, co-partnership, joint stock association, or limited partnership, or corporation, shall neglect, or refuse, for a period of thirty days after such tax becomes due, to make said returns, or to pay the same, the amount thereof, with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth, as other taxes are recoverable by law.

Provided, That, in any case, where the works of one corporation, company, joint stock association, or limited partnership, are leased to and operated by another corporation, company, association, or limited partnership, the taxes imposed by this section shall be apportioned between the said corporations, companies, associations, or limited partnerships, in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes, the Commonwealth shall first look to the corporation, company, association, or limited partnership, operating the works; and, upon payment by the said company, corporation, association, or limited partnership, of a tax upon the receipts, as herein provided, derived from the operation thereof, the corporation, company, joint stock association, or limited partnership, from which the said works are leased, shall not be held liable under this section for any tax upon the proportion of said receipts received by it as rental for the use of said works.

Rhode Island, in preventing title by possession, provides (Gen. Stat. 1882, Title xxii., chap. 175, p. 447)—

SEC. 10. No enjoyment, by any persons, companies, or corporations, for any length of time, of the privilege of maintaining telegraph posts, wires, or apparatus, in, upon, or over, any lands or buildings of other persons, or corporations, shall confer a legal right to the continued enjoyment of such easement, or raise any presumption of a grant thereof.

And, amongst "offences against private property," further provides (Gen. Stat. 1882, Title xxx., chap. 242, p. 680)—

SEC. 48. No person shall place any telegraph or telephone lines or poles, or any fixtures appertaining thereto, upon any private property, without the consent of the owners thereof.

SEC. 49. No person shall labor upon the work of erecting, or repairing, any telegraph or telephone line, belonging to any telegraph or telephone company, without having conspicuously attached to his dress a medal or badge, on which shall be legibly inscribed the name of the owners thereof, by whom he is employed, and a number, by which he can be readily identified.

SEC. 50. Every person who shall violate any of the provisions of the preceding two sections, shall be fined, not exceeding twenty dollars, or be imprisoned, not exceeding three months.

Municipal authorities are also empowered to make regulations (Gen. Stat. 1882, Title vii., chap. 38, p. 115)

SEC. 20. Town Councils and City Councils, may, from time to time, make and ordain all ordinances and regulations for their respective towns, not repugnant to law, which they may deem necessary for the safety of their inhabitants, from fire, firearms, fireworks, explosion of gunpowder from the quantity of or mode or place of storing the same; to prevent persons standing on any footwalk, doorstep, or in any doorway, or riding, driving, fastening or leaving any horse or other animal or any carriage, team, or other vehicle on any such footwalk, sidewalk, doorstep or doorway within such town, to the obstruction, hinderance, delay, disturbance or annoyance of passers by or of persons residing or doing business in the vicinity thereof; to regulate the putting up and maintenance of telegraph and other wires and the appurtenances thereof; to prevent the indecent exposure of any one bathing in any of the waters within their respective towns; against breakers of the Sabbath; against habitual drunkenness; to regulate the speed of driving horses and cattle over bridges; respecting the purchase and sale of merchandise or commodities within their respective towns and cities, to protect burying grounds and the graves therein from trespassers; and, generally, all other ordinances, regulations, and by-laws, for the well ordering, managing, and directing of the prudential affairs and police of their respective towns, not repugnant to the constitution and laws of this State, or of the United States.

For service of process on non-residents, provides (Gen. Stat. 1882, Title xxvi, chap. 207, p. 571)—

SEC. 33. In all actions at law or in equity, against the owners of telegraph and telephone lines, residing out of the State, the leaving of a certified copy of the process, including the process of garnishment, by the proper officer, at any office of said owners, within the State, with some person there in charge, shall be deemed a legal and sufficient service.

State taxation is, of course, provided (Gen. Stat. 1882, Title v, chap. 27, p. 84)—

SEC. 10. Every telegraph company, and every telephone company, doing business within this State, shall, annually, on the first Monday in July, make return to the State Auditor, subscribed and sworn to by its treasurer, or agent within this State, setting forth all the gross receipts of such company, derived from its business transacted within this State, from whatever source the same may come, whether from the transmission of messages, the use of machines, or otherwise, and shall thereafter, annually, on or before the first day of August next succeeding the making of such return, pay to the general treasurer, a tax of one percentum on such gross receipts, for the use of the State, which sum shall be in lieu of all other taxes upon its lines and personal estate used exclusively in telegraphic and telephone business within this State.

South Carolina punishes injuries to poles and wires (Gen. Stat. 1882, Title i, chap. 101, page 711)—

SEC. 2524. Any person who shall wilfully, or unlawfully, injure, damage, or destroy any pole, or wire, of any telegraph, telephone, or electric light company, in this State, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine, not exceeding one hundred dollars, or imprisonment, not exceeding thirty days, or both, in the discretion of the Court or a Trial Justice.

Tennessee provides (Code of 1884, p. 317)—

1787. The charter for electric light, and electric light and power companies, shall be as follows: "State of Tennessee—Charter of Incorporation. Be it known, that (here insert the names of five or more persons above the age of twenty-one years), are hereby constituted a body politic and corporate, by the name and style (here insert the name of the corporation), for the purpose of manufacturing electric light, or for the purpose of manufacturing electric light motive power, electrotyping, etc., or for the purpose of manufacturing electricity for telephoning purposes, etc. (State fully the objects of the company, whether one or more of the above purposes.) The general powers of said corporation are (here insert the powers, as contained in sections 1704-5).

1704. The general powers of all corporations, chartered for purposes of individual profit, shall be—

1. To sue and be sued by the corporate name.
2. To have and use a common seal, which it may alter at pleasure; if no common seal, then the signing of the name of the corporation, by any duly authorized officer, shall be legal and binding.
3. To purchase and hold, or receive by gift, in addition to the personal property owned by said corporation, any real estate necessary for the transaction of the corporate business, and also to purchase or accept any real estate in payment, or part payment, of any debt due to the corporation, and sell realty for corporation purposes.
4. To establish by-laws, and make all rules and regulations not inconsistent with the laws and the constitution, deemed expedient for the management of corporate affairs.
5. To appoint such subordinate officers and agents, in addition to the president, secretary or treasurer, as the business of the corporation may require.
6. To designate the name of the office, and fix the compensation of the officers.
7. To borrow money, and issue notes or bonds, upon the faith of the corporate property, and also to execute a mortgage, or mortgages, as further security for repayment of money thus borrowed.

1705. The following provisions and restrictions are coupled with the said grant of powers:

1. A failure to elect officers at a proper time, does not dissolve the corporation, but those in office hold until the election, or appointment, and qualification of their successors.
2. The term of all officers may be fixed by the by-laws of the corporation; the same not, however, to exceed two years.
3. The corporation may, by by-laws, make regulations concerning the subscription for, or transfer of stock; fix upon the amount of capital to be invested in the enterprise; the division of the same into shares: the time required for payment

thereof by the subscribers for stock ; the amount to be called at any one time ; and in case of failure of any stockholder to pay the amount thus subscribed by him, at the time, and in the amounts thus called, a right of action shall exist in the corporation, to sue said defaulting stockholder for the same.

1788. All companies of the character designated herein, or similar ones, now incorporated in substantial compliance with this article [Art. II. of chapter 3, "Corporations for profit"], shall be, and are, hereby declared to be legal corporations ; and it shall be lawful for telephone and electric light companies, now or hereafter incorporated, to consolidate into one corporation, or partially consolidate or co-operate in such manner as the respective corporations may determine, with the concurrence of the stockholders of each, in full meeting assembled ; but all rights and privileges, conferred by this article, shall be subject to revocation and repeal.

Texas provides for taxation (Rev. Civ. Stat., ed. 1888, Title 95, chap. 1,) as follows—

ART. 4665. There shall be levied on, and collected from, every person, firm, company, or association of persons pursuing any of the following named occupations, an annual tax, except when herein otherwise provided, on every such occupation, or separate establishment, as follows : * * * *

For each telephone company, doing business in this State, an annual tax of fifty dollars, and for each county, in which they may do business, a county tax of ten dollars.

Also, for malicious mischief against telephone lines (O. C. 710, amended by Act February 10, 1885, page 10, by inserting the words "or telephone" after the word "telegraph," Rev. Penal Code, ed. 1888, Title 17, chap. 3, page 234)—

§ 1158—ART. 677. If any person shall intentionally break, cut or tear down misplace, or in any other manner injure any telegraph or telephone wire, post, machinery, or other necessary appurtenance to any telegraph or telephone line, or, in any way, wilfully obstruct or interfere with the transmission of messages along such telegraph or telephone line, he shall be punished by confinement in the penitentiary, not less than two, nor more than five, years, or by fine, not less than one hundred, nor more than two thousand dollars.

Vermont provides for the stringing of wires upon existing poles, by (Rev. Laws 1880, Title 27, chap. 163, page 702)—

SEC. 3645. Whenever any persons or corporations are about to erect a line of telegraph or telephone wires, in and along a highway within any town, city, or incorporated village, in and along which a line of poles has already been erected by other persons or corporations, for a similar purpose, the selectmen of such town, or principal officers of such city or village, shall have the right to permit, and may require, the persons or corporations about to erect a new line, to attach their wires to the poles already standing, as provided in the following section.

SEC. 3646. Said selectmen, or principal officers, shall ascertain, as near as may be, the cost of erecting such line of poles, and shall direct such persons or corpor-

ations as they may require to use said poles, to pay to the owners of the line already erected, a fair proportion of such expense, not to exceed one half the estimated original cost of construction; and in no case shall said poles be used until the owners of the new line shall tender to the original owners of said line of poles, the amount so directed by said officers. And if a pole or poles, used by two or more persons or corporations, shall be required to be repaired, or renewed, the expense thereof shall be borne equally by the persons or corporations using the same.

SEC. 3647. Said officers shall give written notice to the proprietors of both the old and new lines of all their requirements in the premises, and shall also lodge a copy of said notice in the town or city clerk's office, as the case may be.

SEC. 3648. The proprietors of any such line of poles so required to be used by any other person or corporation, shall not take down, or alter, the position of such poles, without obtaining permission of all parties who may have acquired a right to use said poles, or the permission of the town, city, or village officers aforesaid; and any person or corporation, injured by the violation of this section, may maintain an action on the case, founded on this Statute, to recover the amount of such injury.

SEC. 3649. The selectmen, or other officers, shall receive one dollar each, a day, for their services under sections two and three [*ante*, §§ 3646, 3647]; and the decision of a majority of them shall be final. All expenses incurred, shall be paid by the persons, or corporations, erecting such new line.

Vermont also provides against the obstruction of highways, by an act approved November 24, 1884 (Laws, p. 22)—

SEC. 1. Persons or corporations erecting telegraph or telephone wires across a highway in a town, shall either place them under ground, or at such a distance above the surface of the highway that they may not prove an obstruction to travel in the highway. If such wires, already erected across a highway in a town, are, in the opinion of the selectmen, an obstruction, the selectmen may direct the same to be placed under ground, or at a greater height.

SEC. 2. If a wire is erected in violation of the directions of the selectmen, or is not altered, when directed to be altered by the selectmen, the selectmen may remove such wire, and may recover the expense of such removal, of the persons, or corporations, owning such wire, or who, by themselves or their agent, caused the same to be erected in violation of the directions of the selectmen, by an action brought in the name of the town.

SEC. 3. This act shall take effect from its passage.

Trespass by telephone employees is punished by an act (approved November 25, 1884; Laws, p. 102), "in addition to chapter 163 of the Revised Laws," providing—

SEC. 1. Every person, or corporation, maintaining, or operating a telephonic, telegraphic, or other electrical line, who cuts down, mutilates, or injures the trees standing upon the land of another, and anyone, who, in any manner affixes, or causes to be affixed, to the property of another, any post, structure, fixture, wire, or other apparatus for telephonic, telegraphic or other electrical communication, without first having procured the right so to do, by application to and determination

of the selectmen of the town, agreeably to chapter one hundred and sixty-three (163) of the Revised Laws of Vermont, or first obtaining the consent of the owner, or lawful agent of the owner of such property, shall, on complaint of such owner, or his tenant, be punished by fine not exceeding one hundred dollars.

Service of process on companies not organized under the laws of Vermont, is provided for by an act, approved November 25, 1884 (Laws, pp. 49, 50)—

SEC. 1. No insurance, express, telegraph, or telephone company, not organized under the laws of this State, whether said company is a corporation or co-partnership, shall do business in this State, until it has filed with the Secretary of State, a written stipulation, containing a statement of the name of the corporation and the place where chartered, or if a co-partnership, the firm name and the names and residences of the co-partners, and agreeing that legal process affecting such company, served on said Secretary of State, shall have the same effect as if served personally on said corporation, or co-partners, within this State; and such stipulation shall not be revoked, or modified, so long as any cause of action against the stipulating company to any resident of this State, shall continue to exist. Service of process, according to such stipulation, shall be sufficient service on such company; and a copy of such stipulation, certified by said Secretary of State, and his certificate, that process has been served on him, shall be sufficient evidence thereof.

SEC. 2. When process against, or affecting an insurance, express, telegraph, or telephone company, is served on the Secretary of State, it shall be served by duplicate copy, and one copy shall be immediately forwarded by said Secretary of State, by mail, to the said company at its home office, or to a person whom such company designates.

SEC. 3. If any person, as agent for an insurance, express, telegraph, or telephone company, which has not complied with the requirements of section one of this act, shall solicit or receive a risk, or application for insurance, or receives money or value for such insurance by such company, or shall receive any money or value for the transportation of any package, or property, by such express company, or for the transmission of any message, or dispatch, by such telegraph company, or shall receive any money, rent, royalty, or income for such telephone company, for the use of its instruments or lines, or for the sending of any message, he shall be subject to a fine of not less than one hundred dollars and not more than five hundred dollars.

SEC. 4. If any such company does not comply with the aforesaid provisions, a writ of process against such companies may be served, by delivering a true and attested copy thereof, with the officer's return thereon, to an agent of such company residing in this State, thirty days prior to the return day thereof.

SEC. 5. Sections 3608, 3609, 3650, 3651, 3652, 3653, of the Revised Laws [and relating to service on such foreign corporations], are hereby repealed.

The provisions for the erection of telegraph wires, are expressly extended to telephone companies, by an act approved November 26, 1884 (Laws, p. 50)—

SEC. 1. The provisions of sections 3633 to 3643, inclusive, of the Revised Laws [*infra*], relating to telegraph wires and telegraph companies, shall extend to telephone wires and telephone companies.

SEC. 2. This act shall take effect from its passage.

The sections thus extended, form part of chapter 163, Title 27, Revised Laws of 1880, pages 700-1, and provide—

SEC. 3633. Persons associated together to erect a line of telegraph wires in this State, may set, erect, and maintain the posts and other necessary fixtures therefor, in and along any highway; but the same shall be done so as not to interfere with the public convenience in travelling on such highway, or repairing the same.

SEC. 3634. If it is found inconvenient, or inexpedient, to erect such telegraph wires agreeably to the preceding section, the Selectmen in the town where such difficulty arises, shall determine, upon application, where, and in what manner, such wires shall be erected, giving notice to the parties in interest, or their agents, and shall certify their decision, and cause the same to be recorded in the town clerk's office.

SEC. 3635. If it is found desirable to erect such line of telegraph, in and along the streets of a village, or in front of and near residences of any persons, and such persons object thereto, they may apply to the Selectmen of such town, or officers of such village, who shall determine through what streets the same shall pass, or in what manner, if at all, such objections may be obviated; and such decision shall be final, notice being given as required in the preceding section.

SEC. 3636. When such Selectmen, or other officers, are called upon to act, they shall be paid one dollar each a day; and the decision of a majority of them shall be final; and the expenses incurred thereby shall be paid by the persons erecting such telegraph line.

SEC. 3637. When, in the erection of a telegraph line, the owner, or occupant, of lands or tenements sustains, or is likely to sustain, damage thereby, the Selectmen of the town shall appraise such damage, and the same shall be paid before the line is erected; and the decision of such Selectmen shall be final, notice being given as before required in this chapter.

SEC. 3638. A telegraph company incorporated in this State, may erect and maintain its line along the sides of railroad tracks within the limits of lands owned, or held by a railroad corporation, on paying to such corporation reasonable compensation for the same; and if they cannot agree upon such compensation, it shall be determined by commissioners who reside in the vicinity of the railroad, who shall be appointed and ascertain such compensation, agreeably to the provisions of law in case of land taken for railroads.

SEC. 3639. Such telegraph line shall remain the property of such telegraph company, and shall not pass by sale, transfer, or mortgage, made by such railroad corporation, of the lands upon which the line is erected; nor shall the line be liable to attachment, or levy of execution, against such railroad corporation.

SEC. 3640. No enjoyment, for any length of time, of the privilege of maintaining telegraph posts, wires or apparatus, upon or over the buildings, or lands, of other persons, shall give a right to the continued enjoyment of such easement, or raise a presumption of a grant thereof.

SEC. 3641. If a person wilfully, or intentionally injures a telegraph wire, post, or

other fixture, erected, or maintained, in pursuance of this chapter, or wilfully interferes with the working of such telegraph line, or aids, or assists in such offense, he shall forfeit one hundred dollars, to be recovered by an action of debt, founded on this section, in the name of the owner of such telegraph line, for his use; and he may also be fined and imprisoned, as provided in other cases of malicious acts.

SEC. 3642. Towns may construct, for their own use, telegraph lines, upon and along the highways and public roads, within their limits, subject to the provisions of this chapter, so far as the same are applicable.

SEC. 3643. Selectmen may authorize persons, upon such terms as they prescribe, and subject to the provisions of this chapter, as far as applicable, to construct for private use, a telegraph line along the highways of the town.

Vermont had previously given to its incorporated villages and cities, police power over telephone poles, by an act approved November 29, 1882 (Laws, pages 75-6), providing—

SEC. 1. All telegraph, or telephone companies, or associations, and all persons owning, or managing, a telegraph, or telephone, line, shall cause the telegraph, or telephone, poles, run, or hereafter, erected on any highway within the limits of any incorporated village, or city, to be suitably painted, to the satisfaction of the trustees of such village, or aldermen of such city, and shall substitute straight poles in place of all crooked poles now, or hereafter, erected.

SEC. 2. Any telegraph, or telephone company, or association, or person owning, or managing a telegraph, or telephone line, which shall, after twenty days' notice in writing, given by any trustee, or alderman, neglect, or refuse to paint such telegraph, or telephone poles, or substitute straight poles in place of crooked poles, as provided in section one of this act, shall forfeit the sum of one hundred dollars to such village, or city, to be recovered in an action of debt on this statute; and said trustees, or aldermen, in such case, may also cause such poles to be painted, and may substitute straight poles for crooked poles, as provided in section one of this act; and may also recover the expense of so doing, in an action brought in the name of such village, or city, against the owners of such telegraph, or telephone line.

SEC. 3. Whoever shall post, or paint, any sign, advertisement, or notice, on any telegraph, or telephone pole, shall forfeit five dollars to the village, or city, in which such pole is situated.

SEC. 4. Justices of the peace shall have jurisdiction of all offences under this act.

The compensation to be paid for the use of telegraph poles, was fixed by an act approved November 29, 1882 (Laws, pages 74-5), providing—

SEC. 1. Persons desiring to attach a telephone line to the poles maintained by a telegraph company, may apply by petition in writing, to the county court of the county in which, or partly in which, the line of poles, to which it is desired to attach such wires, is situated, stating that they wish to attach a line of wires to such poles. The court so petitioned to, shall appoint three disinterested persons, as commissioners, who shall make examination, and determine whether such line can

be so attached, without injury to the company owning the poles, and if they are of the opinion that they can be so attached, shall so report to the court, and shall also report what, in their opinion, would be a fair annual compensation to be paid by the persons desiring to attach such telephone lines, for the use of such poles. The court may establish such report, or they may reject the same, and appoint new commissioners, to re-examine and report. If a report is finally established, recommending that the telegraph company allow the use of its poles, for a compensation specified in such report, such company shall so allow the use of their poles, on tender of such compensation, and if they hinder, or obstruct persons, so authorized to attach their lines thereto, may be proceeded against by the court establishing the report, as for contempt.

SEC. 2. The petition, with a citation for that purpose, shall be served on such telegraph company, at least twenty days before the sitting of the court to which such petition is preferred.

SEC. 3. Such telephone wires, when affixed to the poles of a telegraph company, under the provisions of the preceding section, shall be put up in such a manner as not to interfere with wires already affixed to such poles.

SEC. 4. This act shall take effect from its passage.

Virginia permits the construction of telephone lines for public use, along roads, railroads, and canals, by the owners thereof (Code of 1887, Title 18, "Chartered Companies, Common Carriers and Railroad Commissioner," chap. 51, "Of Works of Internal Improvement," pp. 330, 342)—

SEC. 1185. Every company which is governed by the act passed on the seventh day of February, eighteen hundred and seventeen, prescribing certain general regulations for the incorporation of turnpike companies, or by the act passed on the eleventh day of March, eighteen hundred and thirty-seven, prescribing certain general regulations for the incorporation of railroad companies, and every company which, since the first day of July, eighteen hundred and fifty, has been, or which hereafter shall be, incorporated to construct any work of internal improvement, shall be governed by the provisions contained in the forty-seventh chapter [of this Title, "Of Joint Stock Companies Generally; and of Companies Chartered by Courts,] and in this Chapter, so far as they can apply to such company, without violating its charter.

SEC. 1231. Any company may construct and maintain along the line of its improvement, an electric telegraph, or telephone, for its own use and that of the public, and make reasonable charges on messages and intelligence conveyed thereby.

And further provides in chapter fifty-four ("Of Telegraph and Telephone Companies") of the same Title of the Code (page 354-6)—

SEC. 1287. Every telegraph and every telephone company, incorporated by this or any other State, or by the United States, may construct, maintain, and operate its line along any of the State or county roads, or works, and over the waters of

the State, and along and parallel to any of the railroads of the State, provided the ordinary use of such roads, works, railroads, and waters, be not thereby obstructed; and along, or over, the streets of any city, or town, with the consent of the council thereof.

SEC. 1288. Such company may contract with any person or corporation, the owner of lands, or of any interest, franchise, privilege, or easement therein, or in respect thereto, over which such line is proposed to be constructed, for the right of way, for erecting, repairing, and preserving its poles and other structures, necessary for operating its line, and the right of way, for the erection and occupation of offices, at suitable distances along its line, for public accommodation.

SEC. 1289. If the company and such owner cannot agree on the terms of such contract, the company shall be entitled to such right of way, upon making just compensation therefor to such owner. Such compensation shall be ascertained and made, as provided in chapter forty-six, for the acquisition of lands by a company incorporated for a work of internal improvement, when such internal improvement company cannot agree on the terms of the purchase with those entitled to the lands wanted for the purpose of the company. The title which may be acquired by a telegraph or telephone company, under this section, shall be only to a right of way for the purposes stated in the preceding section; and no right of way acquired by any such company, under this, or the preceding section, shall be to the exclusion of other like companies from having, or acquiring, a like right of way over the same lands.

SEC. 1290. The three preceding sections shall be subject to repeal, alteration, or modification, and the rights and privileges acquired thereunder shall be subject to revocation or modification, by the General Assembly, at its pleasure.

SEC. 1291. It shall be the duty of every telegraph or telephone company, doing business in this State, to receive dispatches from and for other telegraph or telephone companies or lines, and from and for any person; and, upon the payment of the usual charges therefor, according to the regulations of the company, to transmit the same, faithfully and impartially, and as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a dispatch, faithfully and impartially, and for every failure to transmit a dispatch as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of one hundred dollars to the person sending, or wishing to send, such dispatch. But nothing herein shall prevent any such company from giving preference to dispatches on official business, from or to officers of the United States, or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers, for the transmission to them, for publication, of intelligence of general and public interest, out of its regular order.

SEC. 1292. It shall be the duty of every telegraph or telephone company, upon the arrival of a dispatch at the point to which it is to be transmitted by said company, to deliver it promptly to the person to whom it is addressed, when the regulations of the company require such delivery, or to forward it promptly, as directed, when the same is to be forwarded. For every failure to deliver, or forward, a dispatch as promptly as practicable, the company shall forfeit one hundred dollars to the person sending the dispatch, or to the person to whom it was addressed.

SEC. 1293. Every person, firm, association, or company, doing the business of telegraphing or telephoning for the public, in this State, whether incorporated or not, shall be subject to the provisions of the two preceding sections.

SEC. 1294. The proprietors of each line of telegraph or telephone doing business in this State, shall, annually, on or before the first of October, make a report to the Board of Public Works for the year ending the next preceding thirtieth day of September, showing, in such a way as the Board may prescribe, the amount of capital invested within this State in their line, how much thereof was received by the patentees or inventors, and how much is held by others, the amount per share of stock, the expense of construction and maintaining the line, the gross and net profits of such line, and the regulations adopted to ensure the faithful discharge of the duties of the said proprietors. If they fail to make such report, they shall forfeit five hundred dollars; and the like forfeiture shall be incurred for each succeeding month that such failure shall continue.

Wisconsin punishes injury to telephone lines, by chapter 447, approved April 11, 1885, and published April 16, 1885, Laws, page 450—

SEC. 1. Section 4559 of the Revised Statutes is hereby amended, to read as follows:

SEC. 4559. Any person having the right so to do, who shall remove, or change, any building, or other structure, or any timber, standing or fallen, to which any telegraph or telephone lines, or wires, are in any manner attached, or cause the same to be done, which shall destroy, disturb or injure the wires, poles, or other property of any telegraph or telephone company transacting business in this State, without first giving to such company, at its office nearest to such place of injury, at least twenty-four hours' previous notice thereof, shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding fifty dollars.

And any person who shall break down, interrupt, or remove any telegraph or telephone line, or wire, or destroy, disturb, interfere with, or injure the wires, poles, or other property of any telegraph or telephone company in this State, shall be punished by imprisonment in the county jail, not more than three months, or by fine not exceeding one hundred dollars.

SEC. 2. This act shall take effect and be in force from and after its passage and publication.

The license fee is fixed by Chapter 345, approved April 4, 1883, and published April 13, 1883, Laws, pages 304-6—

SEC. 1. Every person, company, association or corporation, engaged in this State, in the business of transmitting messages by telephone, or of renting, letting, or keeping telephone instruments, wires and batteries, or either, for hire, shall, on or before the tenth day of February in each year, make and return to the State Treasurer, in such form and upon such blanks as shall be furnished by him, a true statement of the gross receipts of such person, company, association, or corporation, during each year; which statement shall be verified by the president, secretary and treasurer of such company, association, or corporation, or of the person so letting, renting, or keeping telephones, wires, and batteries, or either, for hire; otherwise by the oath of the principal officers of such company, association, or corporation. The statement herein required for the year 1883, may be returned on or before the first day of June, 1883.

SEC. 2. Every such person, company, association, or corporation shall, upon returning such statement, apply for a license to carry on such telephone business within the State, and shall pay the license fee therefor, provided in the next section, and thereupon shall receive from the State Treasurer a license to carry on such business for the calendar year, commencing on the first day of January preceding, and ending on the succeeding thirty-first day of December, unless sooner revoked.

SEC. 3. [As amended by chapter 333, approved April 7, 1885, Laws, page 313.] The annual license fee provided for in the preceding section shall be one and one-half per centum of the gross receipts of the business within the State.

SEC. 4. If any such person, company, association, or corporation, engaged in the telephone business in this State, shall neglect to obtain such license, or pay such license fee, or any part thereof, as hereinbefore provided, such person, company, association, or corporation, shall absolutely forfeit to the State the sum of five thousand dollars (\$5000), to be recovered in an action brought in the name of the State, and such neglect, in the case of associations or corporations, shall also be a cause of forfeiture of all the rights, privileges and franchises, under which such business is carried on, whether granted by special charter, or obtained under laws, or existing by comity in corporations. And the Attorney-General shall, upon such neglect, collect by action the pecuniary forfeiture herein imposed, and also proceed to have such rights, privileges, and franchises, duly declared forfeited.

Any association, or corporation, at any time before final judgment of forfeiture of such rights, privileges, and franchises, is rendered, may be permitted to make the return and pay the license fee herein provided for, upon special application to the court in which the action to declare such forfeiture is pending, upon such terms as the court shall direct.

SEC. 5. The payment of the license fee hereinbefore provided for, shall be in lieu of all taxes for any purposes, authorized by the laws of the State, except taxes upon such real estate as may be owned by such person, company, association, or corporation, which is in nowise connected with, or in anywise used in the prosecution of such telephone business.

SEC. 6. The license herein provided for shall certify to the fact of the payment of the license fee, be attested by the greater, or lesser, seal, thereto affixed, and shall be in such form as shall be approved by the Attorney-General.

SEC. 7. This act shall take effect and be in force from and after its passage and publication.

Wisconsin has also regulated the rental charged, by Chapter 196, approved March 23, 1882, and published March 28, 1882, Laws, 647—

SEC. 1. It shall be the duty of every telephone company, or person, firm, or corporation, engaged in the business of leasing telephones to the public, or supplying the public with telephones and telephonic service, or operating a telephone exchange to receive and transmit, without discrimination, messages from and for any other company, person, or persons, upon tender, or payment, of the usual or customary charges therefor; and, upon payment, or tender, of the usual or customary charges therefor, or usual or customary rental sum, it shall be the duty of every telephone company, or person, firm, or corporation, engaged in the business of leasing telephones to the public, or supplying the public with telephones and telephonic service,

or operating a telephone exchange, to furnish, without unreasonable delay, without discrimination, and without any further or additional charge to the person, firm, or corporation applying for the same, including all telegraph companies, a telephone, or telephones, with all the proper or necessary fixtures, as well as connection with the central office or telephone exchange, if desired, and shall connect the telephone of such person, firm, or corporation, with the telephone of any other person, firm, or corporation, having a connection with the same, or a connecting exchange, or central office, whenever requested so to do, without regard to the character of the messages to be transmitted, provided they are not obscure [sic] or profane; and every person, or corporation, neglecting, or refusing, to comply with any of the provisions of this act, shall forfeit not less than twenty-five, nor more than one hundred dollars for each and every day such neglect, or refusal, shall continue, one half to the use of the person, or corporation, prosecuting therefor.

SEC. 2. This act shall take effect and be in force, from and after its passage and publication.

JOHN B. UHLE

RECENT AMERICAN DECISIONS.

Supreme Court of California.

SESLER v. MONTGOMERY.

1. A husband may address words to his wife, in private, which would be slanderous of another person, if spoken in the presence of a third person.

2. An eavesdropper, listening to the conversation of the defendant and his wife, is not such a third person.

3. The common law rule, that the civil existence of the wife is merged in that of her husband, still obtains, save where an exception has been legally established.

Action for slander. Verdict and judgment for plaintiff. Defendant appeals from the judgment and from an order denying a new trial.

In bank: on rehearing. The former opinion is on page 271, *ante*.

Estee, Wilson & McCutchen, J. C. Martin and W. F. Goad, for appellant.

W. W. Allen, A. R. Cotton and W. H. H. Hart, for respondent.

McFARLAND, J. (March 23, 1889). The evidence shows that the alleged slanderous words were spoken (if at all) in the house of the defendant in a conversation addressed exclusively

to his wife ; and the question to be determined is this : Did the speaking of the words, under these circumstances, to his wife alone, constitute a "publication" within the meaning of that word as used in the definition of slander? (The plaintiff was eavesdropping, and claims to have heard the alleged slanderous words from a point outside of the door of the room in which defendant and his wife were talking.)

The Codes of this State provide how marriages may be entered into and how divorces may be obtained, and they also have certain provisions, different from the rules of the common law, about the property of the spouses, and, to a limited extent, about their power to make contracts, etc. But in the Codes there is no attempt made to change the essential nature of marriage, or to state its manifold incidents and consequences, or to establish new rules for the solution of the various questions which arise out of those incidents and consequences. Moreover, although the Codes define slander as a "false and unprivileged publication" of certain matters, they do not declare what shall constitute "publication." For the determination of these questions, therefore—as there are no provisions about them in the Codes—we must look to the common law, which is the basis of our jurisprudence. Political Code, § 4468; *Van Maren v. Johnson* (1860), 15 Cal. 308. It is admitted to be the settled rule that there can be no publication within the meaning of the law of slander unless the words alleged to be slanderous are spoken to, and in the presence of, a third person ; that is, a person other than the one who speaks and the one to whom the words are spoken. A man entirely alone cannot commit slander by talking aloud to himself. And the final question to be solved is whether a wife, when spoken to by her husband in the privacy of home, and not in the presence of others, is a "third person" within the meaning of the law under review, or whether, under those circumstances, there should be applied the doctrine that the husband and wife are, civilly, one person. There is no doubt of the general common-law rule that the civil existence of the wife is merged in that of her husband. Blackstone says that "by marriage the husband and wife are one person in law," and that "the legal existence of the woman is suspended during the marriage, or,

at least, is incorporated and consolidated into that of the husband." Vol. 1, 442. Upon this principle of the legal union of husbands and wives most of their rights, duties, and disabilities depended. They could not be witnesses for or against each other because of the maxims, *nemo in propria causa testis esse debet*, and *nemo tenetur se ipsum accusare*. And upon this ground it has been always held that no prosecution for conspiracy can be maintained against a husband and wife only; because the crime of conspiracy cannot be committed by one person alone, and a husband and wife are but one person in law. 1 Hawkins, Pleas of the Crown 448, § 8; 1 Russell on Crimes, 39; *People v. Richards* (1885), 67 Cal. 412. It is said that this rule was a legal fiction, and that in the course of modern legislation and judicial decisions it has been exploded. But it is no more a fiction than any other general principle of law, and we have seen no authentic account of the explosion. There always were some exceptions to the rule, from the earliest history of the common law, and modern legislation and decision have merely created additional exceptions. The general rule still obtains, save where an exception has been legally established, and we have been referred to no decision establishing an exception as to the point involved in the case at bar. Indeed, the only case in point cited at all is from an inferior court of New York (*Trumbull v. Gibbons* (1818), 3 City H. Rec. 97), in which it was directly held that the delivery of a defamatory manuscript by a husband to a wife was not a publication. And every sound consideration of public policy, every just regard for the integrity and inviolability of the marriage relation—the most confidential relation known to the law—should restrain a court from establishing the exception upon which the judgment in the case at bar rests. When husbands and wives talk to each other alone, the conversation differs but little from the process of talking to one's self, or, as it is sometimes called, "thinking aloud." There is no intention that the conversation shall be repeated to others, and no presumption that it will be. It would be strange, indeed, if a husband or wife could not safely say anything to the other about their neighbors or acquaintances which he or she would not feel warranted in saying to the world. Such a rule would

destroy all opportunity for confidential conference, advice, or suggestion. To a curious person asking what had occurred between a husband and wife in the seclusion of their home, the appropriate answer would be, *id est nullum tui negotii*. It has been held in another State that there was a sufficient publication of a libel where a letter was sent to a wife containing defamatory matter about her husband; and it is argued that the court making the decision must have held the wife to be a third person. *Schenck v. Schenck* (1843), 20 N. J. L. 208. Whether or not that decision was a correct exposition of the law, it is clear, at least, that another principle was involved. As the Court say in that case: "Such a communication, made directly to the wife, is an attempt to poison the fountain of domestic peace, conjugal affection, and filial obligation at their very sources." There the exception which was allowed to the general rule, was in support of the confidential relation of marriage, while in the case at bar the exception sought to be established would be destructive of that relation. Our conclusion is that a communication from a husband to a wife, not in the presence of any other person, does not constitute a publication within the meaning of the law of slander. It follows from this conclusion that the judgment in the case at bar was erroneous. Judgment and order appealed from reversed, and cause remanded.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

Notwithstanding the statement of the California Court, that they had not in December last, been able to find any case exactly in point, the Queen's Bench Division of the English High Court of Justice, on the seventh of the previous February (1888), did decide precisely this principle, as the California Court now declares it to be: *Wennhak v. Morgan*, 20 Q. B. Div. 635. HUDLESTON, B., in delivering the opinions, said—"this is, as far as we know, the first time it has ever been alleged in cases of this kind, that the handing

over of a libel, by the libeller, to his wife, is a publication. I think that the question can be decided on the common law principle, that husband and wife are one. The uttering of a libel to the party libelled is clearly no publication for the purposes of a civil action. And if a libel is uttered on a privileged occasion, to a husband, when his wife is present, it has been held that her presence does not take away the privilege. In *Odgers on Libel and Slander*, 2nd ed. p. 153, there is a reference to *Trumbull v. Gibbons* (1818), 3 City Hall Re-

corder (N. Y.) 97, an American case, of which there is a note in Townshend on Slander and Libel as follows:

"Gibbons wrote defamatory matter of Trumbull, and had fifty copies printed in pamphlet form, in Massachusetts. Forty-five copies he retained, and five copies he sent to his wife, in New Jersey, indorsing four of them with the names of certain persons, acquaintances of the wife, but without any instructions to the wife as to how she should dispose of the copies so sent to her. The wife delivered two of the copies in New Jersey, to the persons whose names were indorsed thereon, and the others she delivered in New Jersey, to Trumbull, who exhibited them to various persons. On Trumbull suing Gibbons in New York for libel, it was contended for defendant (1) that there was no publication by defendant; (2) or no publication within the State. The second point was overruled, and as to the first, it was held that the delivery of the manuscript to be printed, was a publication, although a delivery to a wife, in confidence, would not be a publication, yet, in the case then before the Court, the wife acted as the agent of her husband, and her delivery of the pamphlets amounted to a publication by the defendant." (3rd ed., p. 146, n.)

"We think it our duty to hold that, according to a well recognized principle, husband and wife are in the same position, and therefore, that the uttering of a libel by a husband to his wife, is no publication, in cases apart from the Married Woman's Property Act."

The eavesdropping witness did not figure in this English case, but her actions were not considered by the California Court, in re-establishing the principle of confidential relations between husband and wife.

When Mr. Commissioner HAYNE wrote the first opinion in this case, page 271, *ante*, he relied upon *Schenck*

v. *Schenck* (1843), 20 N. J. L. 208, as establishing, with other authorities, that there was a publication. That decision was rendered by HORN-BLOWER, C. J., in the Supreme Court of New Jersey, upon a rule to set aside a verdict, and the following extract from the opinion conveys all the law in point: "Secondly, whether a sealed letter, addressed to the plaintiff's wife and handed to her, unopened, was such a *publication* as the law requires to constitute a libel. But, upon these points, I have no doubt. A man may slander, or libel, another as effectually, by circulating rumors or reports, or by putting his communication, spoken or written, in the shape of *hearsays*, as by making distinct assertions of the slanderous matter and giving them out as truths within his own knowledge, or for the accuracy of which he pledges his own veracity. The only difference is, the latter class of calumniators are rather the more honorable of the two, if any comparison can be made between such characters."

"Nor have I any doubt but that a sealed letter, or other communication, delivered to a wife, is a publication, within the meaning of the law. A slander, uttered or published abroad, may never reach the ears, or eyes, of wife or children. But such a communication, made directly to the wife, is an attempt to poison the fountains of domestic peace, conjugal affection and filial obedience, at their very sources."

The decision now rendered by the Supreme Court of California rightly points out that another principle was also involved.

The other case relied upon [*Wenman v. Ash* (1853), 13 Q. B. 836] is essentially the same case and decided upon essentially the same grounds.

The case of *State v. Shoemaker* was decided by the Supreme Court of North Carolina, a few days (December 18,

1888), after the principal case. It was an appeal from a judgment, entered upon a verdict of guilty on an indictment for slander. The accused, with his wife, was running towards the prosecutrix, and, when about forty steps distant, halted and shook his fist at the prosecutrix and said—"Yes, there is another damned negro whore, who will go to town to-morrow, and get out another warrant against me." The Court held that the words spoken, unquestionably amounted to a charge of incontinency, within § 1113 of the Code, and then considered the effect of their utterance in the presence of the wife as a publication. DAVIS, J., said—"It is further insisted by the defendant, that the 'legal entity' of the wife being merged, 'husband and wife are one person,' and therefore words spoken by the husband, in the presence of the wife, are protected; and 'assuming that the supposed defamatory words were spoken in the hearing of a third person,' the wife is not such a person, within the meaning of the law; and, if she were such a third person, the fact that she was 'a short distance off,' is not sufficient to prove that she heard the defamatory words. We are unable to see the force of this objection. The words spoken were not of a gentle and confidential character between husband and wife, but spoken in a loud tone, which could have been heard a long way off; and besides, it appears from the testimony on behalf of the defendant, that a negro woman was near, and that the witness, John Lytle, was in hearing, though he testified that the language used by the defendant was different from that charged by the prosecutrix."

The judgment was affirmed. This language would seem to introduce the eavesdropping witness again, by laying stress upon the character and tone of the utterances. This Court will proba-

bly not go so far, where the scene would be amongst the privacies of home.

A review of the recent cases arising from statutory changes in the relation of husband and wife, discloses no breaking down of this salutary principle of the common law, whereby husband and wife were considered as one unit. A few instances will suffice.

In Illinois (*Tyler v. Sanborn*, April 5, 1889), the Supreme Court adhered to the common law doctrine, by declaring a sale made to the wife of an agent, without the knowledge of the landowner, was fraudulent in law, though not in fact under the circumstances of the case, SCHOLFIELD, J., saying—"Such a sale, at common law, would clearly have been voidable, both because the wife there had no independent power to contract, and because the husband would have taken an estate during coverture, in the property. See 1 Shars. Bl. Comm. 441, 442; Reeves, Dom. Rel. (2d ed.), 98, 99, and also Id. 28. * * * * In our opinion, the policy of the law equally prohibits the wife of the agent, as it does the agent himself, from taking title to the property which is the subject of his agency, without the knowledge and express consent of the principal."

In this case, BAILEY, J., and CRAIG, C. J., dissented, the former thus expressing the views of both—"The purchaser here was not the agent, but another person [the wife], who was *sui juris*, and capable of acquiring, owning, and controlling her separate property, wholly independent of any control or interference on the part of her husband. The opinion treats the purchase by the wife as being the same in legal effect as though made by the husband. This, doubtless, would be the case, if the wife were still laboring under the disabilities imposed by the rules of the common law. But our statute has so far emancipated her from those disabilities, as to

place her, in all essential respects, in the same legal position, so far as property rights are concerned, as though she were a *feme sole*. * * * * I cannot, therefore, yield assent to the proposition, that, as the law stands, the wife of an agent must, as a matter of law, be held to be subject to the same legal incapacity to become the purchaser of the property, which is the subject matter of the agency, as is the agent himself. Whether a purchase by her is to be treated as fraudulent, and therefore voidable at the instance of the vendor, must, in my opinion, depend upon the circumstances, and such purchase therefore, presents a question of fraud in fact, and not of fraud in law. I do not question that the relation between the agent and the purchaser, whether as husband and wife, or otherwise, is a circumstance to be considered, in connection with other evidence, whenever fraud in fact is charged."

In Michigan, where the court were strongly of the opinion that the husband had burned his wife's store, still a verdict in favor of the wife, against the insurance company was sustained by denying the motion for a new trial, BROWN, J., saying—"While the facts were such as to excite a grave suspicion of the wife's connivance, they were not such as to legally entitle this defence to be presented to the jury. There can be no question of the legal proposition, that the wife is not chargeable with the fraudulent conduct of her husband, notwithstanding he may have been her agent in the management of the property and the conduct of her business." *Plinsky v. Germania F. & M. Ins. Co.*, U. S. Cir. Ct. E. Dist. Mich., January 11, 1887, 32 Fed. Repr. 47.

In Mississippi, on a creditor's bill to subject a wife's *recently purchased* property to the husband's past debts, HILL, J., said—"Our statute completely emancipates married women from all marital

disabilities as to their personal rights and liabilities. * * * * It often happens that friends of the wife are willing to aid her in procuring the means of support for herself and family, in case of the inability of her husband to do so, * * * * and this with the expectation that she will be aided in the management of her business, by her husband, whose first duty is to provide for the support of his wife and children, including the education of his children. This may well be done without any fraud or injury to the husband's creditors, provided the husband does not reserve to himself any interest in the property, or the income of the business, beyond his own support and necessary personal expenses. There is no obligation upon his wife, to support and maintain him, so long as he is able," that is, as against his creditors, "by his own labor, to support himself:" *Frankenthal v. Gilbert*, U. S. Cir. Ct. S. Dist. Miss., January 1888, 34 Fed. Repr. 5, 7.

In Wisconsin (*Lane v. Duchac*, March 12, 1889), where a mortgage was made to a married woman, in her maiden name, LYNN, J., said—"It is not true that a fictitious payee and mortgagee is named in the note and mortgage. Barbara M. Rhyner is not a fictitious person, but a person *in esse*. True, since her marriage, she is entitled to the name of her husband, Zentner, but we are aware of no law that will invalidate obligations and conveyances executed by her, and to her, in her baptismal name, if she chooses to give, or take, them in that form."

Without entering upon the question of confidential communications, a few instances are subjoined to show the nature of such a communication, in the light of the principal case.

In Indiana, the wife was allowed to testify to her husband's intoxicated condition, when he came to her father's house: *Stanley v. Stanley* (1887), 112

Ind. 143. But MITCHELL, J., was careful to say—"The husband's condition, as to being intoxicated, unless it should appear to have been specially confided to the wife in the absence of others, cannot be regarded as in the nature of a confidential communication."

In the same State, when the wife was allowed to prove by her own oath, that she had authorized her husband to act as her agent, MORRIS, C., said—"The object of the Statute of 1879 (Acts of 1879, p. 245), was not to impose additional restrictions as to the disclosure of communications between husband and wife, but to continue the law as it has long existed upon the subject. The authority given by the wife, to the husband, to transact her business, is not confidential nor intended to be private. Such authority may be in writing, or

may be verbal. It is intended to be known, and would be worthless unless known : " *Schmied v. Frank* (1882), 86 Ind. 250, 258.

In Massachusetts (*Comm v. Jardine*, 1887, 143 Mass. 567), a married woman has been allowed to testify to complaints of pain and suffering in limbs and body, by her husband, after an assault. The enquiry called for nothing more, and, therefore, she was not testifying to anything confidential or private.

In Vermont, the wife of one party to a contract was the only means of communication between the parties in making the contract. She was allowed to testify in favor of the husband, on the ground of being the agent of both parties: *Martin v. Hurlbert* (1888), 60 Vt. 364.

JOHN B. UHLE.

Supreme Court of the United States.

CENTRAL NATIONAL BANK OF WASHINGTON CITY v. HUME.

HUME v. CENTRAL NATIONAL BANK.

An insolvent debtor may insure his life for the benefit of his wife and children and pay the premiums out of his own earnings, without rendering the proceeds of such insurance liable for the claims of his creditors.

The payment of the premiums for such insurance is not equivalent to a transfer of property with intent to hinder, delay and defraud creditors, such as would be fraudulent and void under the Statute of 13 Elizabeth, c. 5.

Semble, per FULLER, C. J., "that, should an insolvent debtor pay large premiums out of all reasonable proportion to his known or reputed financial condition, and under circumstances of grave suspicion which might justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources, his creditors would be entitled upon his death to receive from the insurance money the amount of the premiums thus paid; but in such case both the beneficiary named in the policy and the insurer must be shown to have participated in the fraudulent intent.

Appeals from the Supreme Court of the District of Columbia.

On the 23d of April, 1872, in consideration of an annual premium of \$230.89, the Life Insurance Company of Virginia

issued at Petersburg, in that commonwealth, a policy of insurance on the life of Thomas L. Hume, of Washington, D. C., for the term of his natural life, in the sum of \$10,000, for the sole use and benefit of his wife, Annie Graham Hume, and his children, payment to be made to them, their heirs, executors, or assigns, at Petersburg, Virginia.

The charter of the company provided as follows :

Any policy of insurance issued by the Life Insurance Company of Virginia on the life of any person, expressed to be for the benefit of any married woman, whether the same be effected originally by herself or her husband, or by any other person, or whether the premiums thereafter be paid by herself or her husband or any other person as aforesaid, shall enure for her sole and separate use and benefit and that of her husband's children, if any, as may be expressed in said policy, and shall be held by her free from the control or claim of her husband or his creditors, or of the person effecting the same and his creditors. (Sec. 7.)

The application for this policy was made on behalf of the wife and children by Thomas L. Hume, who signed the same for them.

The premium of \$230.89 was reduced by annual dividends of \$34.71 to \$196.18, which sum was regularly paid on the 23d of April, 1872, and each year thereafter, up to and including the 23d of April, 1881.

On the 28th of March, 1880, the Hartford Life and Annuity Company of Hartford, Connecticut, issued five certificates of insurance upon the life of Thomas L. Hume, of \$1,000 each, payable at Hartford to his wife, Annie G. Hume, if living, but otherwise to his legal representatives. Upon each of these certificates a premium of ten dollars was paid upon their issuance, amounting in all to \$50, and thereafter certain other sums, amounting at the time of the death of Hume to \$41.25.

On the 17th of February, 1881, the Maryland Life Insurance Company of Baltimore issued, at Baltimore, a policy of insurance upon the life of Thomas L. Hume, in the sum of \$10,000, for the term of his natural life, payable in the city of Baltimore to "the said insured, Annie G. Hume, for her sole use, her executors, administrators, or assigns"; the said policy being issued, as it recites on its face, in consideration of the sum of \$337.20 to them duly paid by said Annie G. Hume, and of an annual premium of the same amount to be paid each year during the continuance of the policy. The application

for this policy was signed "Annie G. Hume, by Thomas L. Hume," as is a recognized usage in such applications and in accordance with instructions to that effect printed upon the policy.

The charter of the Maryland Life Insurance Company provides as follows :

Section 17. That it shall be lawful for any married woman, by herself or in her name or in the name of any third person, with his consent, as her trustee, to be caused to be insured in said company, for her sole use, the life of her husband, for any definite period or for the term of his natural life, and in case of her surviving her husband the sum or net amount of the insurance shall be payable to her to and for her own use, free from the claims of the representatives of her husband or of any of his creditors. In case of the death of the wife before the decease of the husband, the amount of the insurance may be made payable, after the death of the husband, to her children, or, if under age, to their guardian, for their use; in the event of there being no children, she may have power to devise, and if dying intestate, then to go [to] the next of kin.

The directions printed on the margin of the policy called especial attention to the provisions of the charter upon this subject, an extract from which was printed on the fourth page of the application. The amount of premium paid on this policy was \$242.26, a loan having been deducted from the full premium of \$337.20.

On the 13th of June, 1881, the Connecticut Mutual Life Insurance Company, of Hartford, in consideration of an annual premium of \$350.30, to be paid before the day of its date, issued a policy of insurance upon the life of Thomas L. Hume, in the sum of \$10,000, for the term of his natural life, payable at Hartford to Annie G. Hume and her children by him, or their legal representatives. The application for this policy was signed "Annie G. Hume, by Thomas L. Hume." It was expressly provided, as part of the contract, that the policy was issued and delivered at Hartford, in the State of Connecticut, and was "to be in all respects construed and determined in accordance with the laws of that State."

The "statute of Connecticut respecting policies of insurance issued for the benefit of married women" was printed upon the policy under that heading, and is as follows :

Any policy of life insurance expressed to be for the benefit of a married woman, or assigned to her or in trust for her, shall inure to her separate use, or, in

case of her decease before payment, to the use of her children or of her husband's children, as may be provided in such policy. *Provided*, That, if the annual premium on such policy shall exceed three hundred dollars, the amount of such excess, with interest, shall inure to the benefit of the creditors of the person paying the premiums ; but if she shall die before the person insured, leaving no children of herself or husband, the policy shall become the property of the person who has paid the premiums, unless otherwise provided in such policy.

And this extract from the statute was printed upon the policy and attention directed thereto. From the \$350.30 premium the sum of \$105 was deducted, to be charged against the policy in accordance with its terms, with interest, and \$245.30 was therefore the sum paid.

The American Life Insurance Company of Philadelphia had also issued a policy in the sum of \$5,000 on the life of Hume, payable to himself or his personal representatives, and this was collected by his administrators.

Thomas L. Hume died at Washington on the 23d of October, 1881, insolvent, his widow Annie G. Hume and six minor children surviving him.

November 2d, 1881, the Central National Bank of Washington, as the holder of certain promissory notes of Thomas L. Hume, amounting to several thousand dollars, filed a bill in the Supreme Court of the District of Columbia against Mrs. Hume and the Maryland Life Insurance Company, alleging that the policy issued by the latter was procured while Hume was insolvent ; that Hume paid the premium of \$242.26 without complainant's knowledge or consent, and for the purpose of hindering, delaying, and defrauding the complainant and his other creditors ; and praying for a restraining order on the insurance company from paying to, and Mrs. Hume from receiving, either for herself or children, the amount due pending the suit, and " that the amount of the said insurance policy may be decreed to be assets of said Thomas L. Hume, applicable to the payment of debts owing by him at his death," etc. The temporary injunction was granted.

On the 12th of November, the insurance company filed its answer to the effect that Mrs. Hume obtained the insurance in her own name, and was entitled under the policy to the amount thereof, and setting up and relying upon the 17th section of its charter, quoted above. Mrs. Hume answered, November 16,

declaring that she applied for and procured the policy in question, and that it was not procured with fraudulent intent ; that the estate of her father, A. H. Pickrell, who died in 1879, was the largest creditor of Hume's estate ; that she is her father's residuary legatee ; that the amount of the policy was intended not only to provide for her, but also to secure her against loss ; that her mother had furnished Hume with about a thousand dollars annually to be used for her best interests and that of his wife and children ; and that the premium paid on the policy in question and those paid on other policies, was and were paid out of money belonging to her father's estate, or out of the money of her mother applied as directed and requested by the latter.

Benjamin U. Keyser, receiver, holding unpaid notes of Hume, was allowed, by order of court, November 16, 1881, to intervene as co-complainant in the cause.

R. Ross Perry and Reginald Fendall were appointed, November 26, 1881, Hume's administrators.

On January 23, 1882, the administrators filed three bills (and obtained injunctions) against Mrs. Hume and each of the other insurance companies, attacking each of the policies (except the American) as a fraudulent transfer by an insolvent of assets belonging to his creditors.

The answers of Mrs. Hume were substantially the same *mutatis mutandis* as above given, and so were the answers of the Connecticut Mutual and the Virginia Life, the former pleading the statute of Connecticut as part of its policy, and the latter the seventh section of its charter.

The Hartford Life and Annuity Company did not answer, and the bill to which it was a party defendant was taken *pro confesso*.

The administrators were, by order of court, January 2, 1883, admitted parties defendant.

January 4, 1883, the Court entered a decretal order, dissolving the restraining order in one case, and directing the Virginia Insurance Company to pay the amount due upon its policy into court, and the clerk of the court to pay the same over to Mrs. Hume, for her own benefit and as guardian of her children (which was done accordingly), and continuing the

injunctions in the other cases, but ordering the other insurance companies to pay the amounts due into the registry of the court.

By order of Court, January 30, 1883, the Farmers' and Mechanics' National Bank of Georgetown, which had proved up a large claim against Hume's estate, was allowed to intervene as a co-complainant; and March 19, 1883, George W. Cochran, a creditor, was by like order allowed to intervene as co-complainant.

Replications were filed and testimony taken on both sides.

The evidence tended to show that Hume's financial condition as early as 1874 was such that if called upon to respond on the instant he could not have met his liabilities, and that this condition grew gradually worse until it culminated in irretrievable ruin in the fall of 1881; but it also indicates that for several years, and up to October 21, 1881, two days before his death, he was a partner in a going concern apparently of capital and credit; that he had a considerable amount of real estate, though most of it was heavily encumbered; that he was an active business man, not personally extravagant; and that he was, for two years prior to October, in receipt of moneys from his wife's mother, who had an income from her separate property.

He seems to have received from Mrs. Pickrell, or the estate of Pickrell, his wife's father, of which Mrs. Hume was the residuary legatee, over six thousand dollars in 1879, over three thousand dollars in 1880, and over seventeen hundred dollars in 1881.

Mrs. Pickrell's fixed income was one thousand dollars a year from rents of her own property, which after the death of her husband in May, 1879, was regularly paid over to Mr. Hume. She testifies that she told Hume that "he could use all that I [she] had for his own and his family's benefit, and that he could use it for anything he thought best"; that she had out of it herself from \$200 to \$250 a year from the death of Pickrell, in May, 1879, to that of Hume, in October, 1881, and that before his death Mr. Hume informed his wife and herself that he had insured his life for Mrs. Hume's benefit, but did not state where the premium money came from.

Blackford, agent for the Maryland Company, testified, under objection, that Hume told him in February, 1881, that certain means had been placed in his hands, to be invested for his wife and children, and he had concluded to take \$10,000 in Blackford's agency, and should some months later take \$10,000 in the Connecticut Mutual. He accordingly took the \$10,000 in the Maryland, and subsequently, during the summer, informed Blackford that he had obtained the insurance in the Connecticut Mutual.

Evidence was also adduced that Mr. Hume was largely indebted to Pickrell's estate, by reason of endorsements of his paper by Pickrell, and the use by him in raising money of securities belonging to the latter, and that said estate is involved in litigation and its ultimate value problematical.

The causes were ordered to be heard in the first instance at a general term of the Supreme Court of the District of Columbia, which Court, after argument, on the 5th day of January, 1885, decreed that the administrators should recover all sums paid by Thomas L. Hume as premiums on all said policies, including those on the Virginia policy from 1874, and that after deducting said premiums, the residue of the money paid into Court (being that received from the Maryland and the Connecticut Mutual) be paid to Mrs. Hume individually or as guardian for herself and children, and that the Hartford Life and Annuity Company pay over to her the amount due on the certificates issued by it.

From this decree the said Central National Bank, Benjamin U. Keyser, the Farmers' and Mechanics' National Bank of Georgetown, George W. Cochran, and the administrators, as well as Mrs. Hume, appealed, and the cause came on to be heard upon these cross-appeals.

Walter D. Davidge, R. Ross Perry and Edwards & Barnard for creditors and administrators; *Enoch Totten and Gordon & Gordon* for Mrs. Hume and her children.

Mr. Chief Justice FULLER, November 12, 1888, (after stating the facts as above):

No appeal was prosecuted from the decree of January 4, 1883, directing the amount due upon the policy issued by the

Life Insurance Company of Virginia to be paid over to Mrs. Hume for her own benefit and as guardian of her children, nor is any error now assigned to the action of the Court in that regard. Indeed, it is conceded by counsel for the complainants, that this contract was perfectly valid as against the world, but it is insisted that, assuming the proof to establish the insolvency of Hume in 1874 and thenceforward, the premiums paid in that and the subsequent years on this policy belonged in equity to the creditors, and that they were entitled to a decree therefor as well as for the amount of the Maryland and Connecticut policies and the premiums paid thereon.

It is not denied that the contract of the Maryland Insurance Company was directly between that company and Mrs. Hume, and this is, in our judgment, true of that of the Connecticut Mutual, while the Hartford Company's certificates were payable to her, if living.

Mr. Hume having been insolvent at the time the insurance was effected, and having paid the premiums himself, it is argued that these policies were within the provisions of 13 Elizabeth, c. 5, and inure to the benefit of his creditors as equivalent to transfers of property with intent to hinder, delay, and defraud. The object of the statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors; but dealing with that which creditors, irrespective of such dealing, could not have touched, is within neither the letter nor the spirit of the statute. In the view of the law, credit is extended in reliance upon the evidence of the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit. And where a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held that, as against creditors, his assignment, when insolvent, of such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer of assets within the statute, and this, even though the debtor may have had no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act

has in point of fact withdrawn such a fund from them, and dealt with it by way of bounty. *Freeman v. Pope* (1869), L. R., 9 Eq. 206; s. c. (1870), L. R., 5 Ch. 538. The rule stands upon precisely the same ground as any other disposition of his property by the debtor. The defect of the disposition is that it removes the property of the debtor out of the reach of his creditors. *Cornish v. Clark* (1872), L. R., 14 Eq. 184.

But the rule applies only to that which the debtor could have made available for payment of his debts. For instance, the exercise of a general power of appointment might be fraudulent and void under the statute, but not the exercise of a limited or exclusive power, because, in the latter case, the debtor never had any interest in the property himself which could have been available to a creditor, or by which he could have obtained credit. May on Fraudulent Conveyances, p. 33. It is true that creditors can obtain relief in respect to a fraudulent conveyance where the grantor cannot, but that relief only restores the subjection of the debtor's property to the payment of his indebtedness as it existed prior to the conveyance.

A person has an insurable interest in his own life for the benefit of his estate. The contract affords no compensation to him, but to his representatives. So the creditor has an insurable interest in the debtor's life, and can protect himself accordingly, if he so chooses. Marine and fire insurance is considered as strictly an indemnity; but while this is not so as to life insurance, which is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen, in consideration of the payment of the premiums as stipulated, nevertheless the contract is also a contract of indemnity. If the creditor insures the life of his debtor, he is thereby indemnified against the loss of his debt by the death of the debtor before payment; yet, if the creditor keeps up the premiums, and his debt is paid before the debtor's death, he may still recover upon the contract, which was valid when made, and which the insurance company is bound to pay according to its terms; but if the debtor obtains the insurance on the insurable interest of the creditor, and pays the premiums himself, and the debt is extinguished before the insurance falls in, then the proceeds

would go to the estate of the debtor. *Knox v. Turner* (1870), L. R., 9 Eq. 155.

The wife and children have an insurable interest in the life of the husband and father, and if insurance thereon be taken out by him and he pays the premiums and survives them, it might be reasonably claimed in the absence of a statutory provision to the contrary, that the policy would inure to his estate.

In *Continental Life Ins. Co. v. Palmer* (1875), 42 Conn. 60, the wife insured the life of the husband, the amount insured to be payable to her if she survived him, if not, to her children. The wife and one son died prior to the husband, the son leaving a son surviving. The Court held that under the provisions of the statute of that State, the policy being made payable to the wife and children, the children immediately took such a vested interest in the policy, that the grand-son was entitled to his father's share, the wife having died before the husband, but that in the absence of the statute "it would have been a fund in the hands of his representatives for the benefit of the creditors, provided the premiums had been paid by him." So in the case of *Anderson's Estate, Hay's and Kerr's Appeal* (1877), 85 Pa. 202. A. insured his life in favor of his wife, who died intestate in his lifetime, leaving an only child. A. died intestate and insolvent, the child surviving, and the Court held that the proceeds of the policy belonged to the wife's estate, and, under the intestate laws, was to be distributed share and share alike between her child and her husband's estate, notwithstanding, under a prior statute, life insurance taken out for the wife vested in her free from the claims of the husband's creditors. But if the wife had survived she would have taken the entire proceeds.

We think it cannot be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent, nor has he any interest therein of which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts, which belong to the beneficiaries to whom they are payable.

It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. Bliss on Life Insurance, 2d ed., p. 517; *Glanz v. Gloeckler* (1881), 10 Bradw. (Ill.), 486, per McALLISTER, J.; s. c. (1882), 104 Ill. 573; *Wilburn v. Wilburn* (1882), 83 Ind. 55; *Ricker v. Charter Oak Life Ins. Co.* (1880), 27 Minn. 193; *Charter Oak Life Ins. Co. v. Brant* (1871), 47 Mo. 419; *Gould v. Emerson* (1868), 99 Mass. 154; *Knickerbocker Life Ins. Co. v. Weitz* (1868), Id. 157.

This must ordinarily be so where the contract is directly with the beneficiary; in respect to policies running to the person insured, but payable to another having a direct pecuniary interest in the life insured; and where the proceeds are made to enure by positive statutory provisions.

Mrs. Hume was confessedly a contracting party to the Maryland policy; and as to the Connecticut contracts, the statute of the State where they were made and to be performed, explicitly provided that a policy for the benefit of a married woman shall enure to her separate use or that of her children, but if the annual premium exceed three hundred dollars, the amount of such excess shall enure to the creditors of the person paying the premiums.

The rights and benefits given by the laws of Connecticut in this regard are as much part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place.

And if this be so as between Hume and the Connecticut companies, then he could not have at any time disposed of these policies without the consent of the beneficiary. Nor is there anything to the contrary in the statutes or general public policy of the District of Columbia.

It may very well be that a transfer by an insolvent of a Connecticut policy, payable to himself or his personal representatives, would be held invalid in the District, even though valid

under the laws of Connecticut, if the laws of the District were opposed to the latter, because the positive laws of the domicile and the forum must prevail ; but there is no such conflict of laws in this case in respect to the power of disposition by a person procuring insurance payable to another.

The obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children, and payable to them, has been repeatedly recognized by the courts.

Thus, in *Elliott's Appeal* (1865), 50 Pa. 75, where the policies were issued in the name of the husband, and payable to himself or his personal representative, and while he was insolvent were by him transferred to trustees for his wife's benefit, the Supreme Court of Pennsylvania, while holding such transfers void as against creditors, say :

We are to be understood in thus deciding this case that we do not mean to extend it to policies effected without fraud, directly and on their face for the benefit of the wife, and payable to her ; such policies are not fraudulent as to creditors, and are not touched by this decision.

In the use of the words " without fraud," the Court evidently means actual fraud participated in by all parties, and not fraud inferred from the mere fact of insolvency ; and, at all events, in *McCutcheon's Appeal* (1881), 99 Pa. 133, the Court say, referring to *Elliott's Appeal* :

The policies in that case were effected in the name of the husband, and by him transferred to a trustee for his wife at a time when he was totally insolvent. They were held to be valuable choses in action, the property of the assured, liable to the payment of his debts, and hence their voluntary assignment operated in fraud of creditors, and was void as against them under the statute of 13th Elizabeth. Here, however, the policy was effected in the name of the wife, and in point of fact was given under an agreement for the surrender of a previous policy for the same amount also issued in the wife's name. . . .

The question of good faith or fraud only arises in the latter case ; that is, when the title of the beneficiary arises by assignment. When it exists by force of an original issue in the name, or for the benefit of the beneficiary, the title is good notwithstanding the claims of creditors. . . . There is no anomaly in this, nor any conflict with the letter or spirit of the statute of Elizabeth, because in such cases the policy would be at no time the property of the assured, and hence no question of fraud in its transfer could arise as to his creditors. It is only in the

case of an assignment of a policy that *once belonged* to the assured that the question of fraud can arise under this act.

And see *Ætna National Bank v. U. S. Life Ins. Co.* (1885), 24 Fed. Repr. 770; *Prince v. Makepeace* (1879), 65 Ind. 345; *Succession of Hcaring* (1874), 26 La. An. 326; *Stigler's Ex'r v. Stigler* (1883), 77 Va. 163; *Thompson v. Cundiff* (1875), 11 Bush (Ky.) 567.

Conceding, then, in the case in hand, that Hume paid the premiums out of his own money, when insolvent, yet, as Mrs. Hume and the children survived him, and the contracts covered their insurable interest, it is difficult to see upon what ground the creditors, or the administrators as representing them, can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest insured was neither the debtor's nor his creditors'. The contracts were not payable to the debtor, or his representatives, or his creditors. No fraud on the part of the wife, or the children, or the insurance company, is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer. This seems to have been the view of the court below, for the decree awarded to the complainants the premiums paid to the Virginia company from 1874 to 1881, inclusive, and to the other companies from the date of the respective policies, amounting, with interest to January 4, 1883, to the sum of \$2,696.10, which sum was directed to be paid to Hume's administrators out of the money which had been paid into court by the Maryland and Connecticut Mutual companies.

But, even though Hume paid this money out of his own funds when insolvent, and if such payment were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies, which belonged to the beneficiaries for the reasons already stated.

Were the creditors, then, entitled to recover the premiums?

These premiums were paid by Hume to the insurance companies, and to recover from them would require proof that the latter participated in the alleged fraudulent intent, which is not claimed. Cases might be imagined of the payment of large

premiums, out of all reasonable proportion to the known or reputed financial condition of the person paying, and under circumstances of grave suspicion, which might justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources; but no element of that sort exists here.

The premiums form no part of the proceeds of the policies, and cannot be deducted therefrom on that ground.

Mrs. Hume is not shown to have known of her husband's insolvency, and if the payments were made at her instance, or with her knowledge and assent, or if, without her knowledge, she afterwards ratified the act, and claimed the benefit, as she might rightfully do (*Thompson v. American Ins. Co.* (1871), 46 N. Y. 674), and as she does (and the same remarks apply to the children), then has she thereby received money which *ex æquo et bono* she ought to return to her husband's creditors, and can the decree against her be sustained on that ground?

If, in some cases, payments of premiums might be treated as gifts inhibited by the statute of Elizabeth, can they be so treated here?

It is assumed by complainants that the money paid was derived from Hume himself, and it is therefore argued that to that extent his means for payment of debts were impaired. That the payments contributed in any appreciable way to Hume's insolvency is not contended. So far as premiums were paid in 1880 and 1881 (the payments prior to those years having been the annual sum of \$196.18 on the Virginia policy), we are satisfied from the evidence that Hume received from Mrs. Pickrell, his wife's mother, for the benefit of Mrs. Hume and her family, an amount of money largely in excess of these payments, after deducting what was returned to Mrs. Pickrell, and that in paying the premiums upon procuring the policies in the Maryland and the Connecticut Mutual, Hume was appropriating to that purpose a part of the money which he considered he thus held in trust, and we think that, as between Hume's creditors and Mrs. Hume, the money placed in Hume's hands for his wife's benefit is, under the evidence, equitably as much to be accounted for to her by Hume, and so by them, as is the money paid on her account to be accounted for by her to him or them.

We do not, however, dwell particularly upon this, nor pause to discuss the bearing of the laws of the States of the insurance companies upon this matter of the payment of premiums by the debtor himself, so far as they may differ from the rule which may prevail in the District of Columbia, in the absence of specific statutory enactment upon that subject, because we prefer to place our decision upon broader grounds.

In all purely voluntary conveyances it is the fraudulent intent of the donor which vitiates. If actually insolvent, he is held to knowledge of his condition; and if the necessary consequence of his act is to hinder, delay, or defraud his creditors, within the statute, the presumption of the fraudulent intent is irrebuttable and conclusive, and inquiry into his motives is inadmissible.

But the circumstances of each particular case should be considered, as in *Partridge v. Gopp* (1758), 1 Eden 163; s. c. Ambl. 595, where the Lord Keeper, while holding that debts must be paid before gifts are made, and debtors must be just before they are generous, admitted that "the fraudulent intent might be collected from the magnitude and value of the gift."

Where fraud is to be imputed, or the imputation of fraud repelled, by an examination into the circumstances under which a gift is made to those towards whom the donor is under natural obligation, the test is said, in *Kipp v. Hanna* (1829), 2 Bland (Md.) 33, to be the pecuniary ability of the donor at that time to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their then prospects of payment; and in considering the sufficiency of the debtor's property for the payment of debts, the probable, immediate, unavoidable, and reasonable demands for the support of the family of the donor should be taken into the account and deducted, having in mind also the nature of his business and his necessary expenses: *Emerson v. Bemis* (1873), 69 Ill. 537.

This argument in the interest of creditors concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended

to protect them from destitution after the debtor's death, by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or which could thereby be, lawfully obtained, at least to the extent of requiring that, under such circumstances, the fraudulent intent of both parties to the transaction should be made out.

And inasmuch as there is no evidence from which such intent on the part of Mrs. Hume or the insurance companies could be inferred, in our judgment none of these premiums can be recovered.

The decree is affirmed, except so far as it directs the payment to the administrators of the premiums in question and interest, and, as to that, is reversed, and the cause remanded to the court below, with directions to proceed in conformity with this opinion.

Ordered accordingly.

In the earliest case upon the subject (*Grogan v. Cooke* (1812), 2 Ball & B. 230), Lord MANNERS expressed a doubt whether the transfer of policies of insurance could be considered as fraudulent and covinous, within the meaning of the statute of Elizabeth. But the law in England has been settled otherwise, and the courts have in a number of cases set aside assignments of insurance policies to members of the insured's family, as being in fraud of creditors: *Stokoe v. Cowan* (1861), 29 Beav. 637; *Penhall v. Elwin* (1853), 1 Sm. & G. 258; *Jenkyn v. Vaughan* (1856), 3 Drew. 419; *Freeman v. Pope* (1869), L. R. 9 Eq. 206; *Taylor v. Coenen* (1876), L. R. 1 Ch. D. 636. In the United States such assignments have also been held to be void as against creditors: *Catchings v. Manlove* (1861), 39 Miss. 655; *Elliott's Appeal* (1865), 50 Pa. 75; *Stokes v. Coffey* (1872), 8 Bush (Ky.) 533; *Burton v. Farinholt* (1882), 86 N. C. 260.

But there is a marked distinction be-

tween the cases of a policy issued originally in favor of the husband, and assigned by him, and a policy issued in the first instance, as in the principal case, to the wife, child or other dependent relative as beneficiary. This distinction is broadly recognized in *Elliott's Appeal*, *supra*, and in the later Pennsylvania case of *McCutcheon's Appeal* (1881), 99 Pa. 133, in the language quoted by the Chief Justice on page 428, *supra*. In England the right of a wife to the proceeds of policies, issued in her favor upon her husband's life, although the premiums may have been paid by him, is now protected by statute against the claims of his creditors. The original English Statute securing this right (Act of 1870, 33 and 34 Vict., Ch. 93, Sec. 10), has been superseded by the Act of 1882, 45 and 46 Vict., Ch. 75, Sec. 11, which provides that "a policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife

and children, or any of them, shall create a trust in favor of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his debts; *provided*, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid." A similar provision is made as to policies taken out upon the life of the wife in favor of husband or children, and the appointment of a trustee to receive the insurance money is authorized. Prior to these acts a policy in favor of wife or children would have been held fraudulent in England, as against creditors: *French v. French* (1855), 6 De G. M. & G. 95; *Holt v. Everall* (1876), L. R. 2 Ch. D. 266.

In almost all the States of this country the same protection has been given by legislative enactment, and in one by constitutional provision. The Constitution of *North Carolina* provides (Art. 10, Sec. 7): "The husband may insure his own life for the sole use and benefit of his wife and children, and in case of the death of the husband the amount thus insured shall be paid over to the wife and children, * * * free from all the claims of the representatives of the husband, or any of his creditors." This provision does not apply to an assignment by a husband to his wife of a policy originally issued to him, such assignment being void as against his creditors: *Burton v. Furinkolt* (1882), 86 N. C. 260.

The Code of *Alabama*, Vol. 1, Sec. 2356, provides: "The wife, in her own name, or in the name of a trustee, may insure the life of her husband for the benefit of herself, or for the benefit of herself and any child or children of the

marriage. Or the husband or father may insure his life for the benefit of his wife, or for the benefit of his wife and children, or for the benefit of his minor child or children, and such insurance is exempt from liability for his debts or engagements, or for his torts, or any penalty or damages recoverable of him, if the annual premiums do not exceed \$500; or, if such premiums exceed \$500, then to the extent of the insurance which an annual premium of \$500 would purchase."

Under this statute, the proceeds of an insurance policy in excess of the amount which could be purchased by an annual premium of \$500, constitute a fund for the payment of the insured's debts: *Stone v. Knickerbocker Life Ins. Co.* (1875), 52 Ala. 589. The statute is in the nature of an exemption law and must be construed liberally: *Felrath v. Schonfeld* (1884), 76 Id. 199. But a policy in favor of one only of several children is not protected: *Fearn v. Ward* (1880), 65 Id. 33.

Arkansas (Dig. Stat. 1884, Sec. 4623) gives the wife, with her husband's assent, the right to insure, or cause to be insured, his life, the proceeds to go to her, or, in the event of her not surviving her husband, to her children, free from the claims of creditors, but provides that "such exemption shall not apply where the amount of premium annually paid out of the funds or property of the husband shall exceed the sum of \$300."

In *California*, by the Code of Civil Procedure, Sec. 690, "all moneys, benefits, privileges or immunities accruing, or in any manner growing out of, a life insurance on the life of the debtor, if the annual premiums do not exceed \$500, are exempted from liability for the debts of the insured," and, by Sec. 3470, it is provided that insurance upon the life of an assignee shall not pass by an assignment for the benefit of

creditors, unless specially mentioned in the deed.

Under the former section, it has been held, it must be shown affirmatively that the insurance was made by a company incorporated under the laws of California, that it is insurance on the life of the debtor, and that the policy is not of the excepted class: *Briggs v. McCullough* (1869), 36 Cal. 542.

In *Colorado* there is no statute affecting the question under consideration, and in *Goodrich v. Treat* (1877), 3 Colo. 408, it was expressly left undetermined by the Supreme Court of that State.

The *Connecticut* statute (Gen. Stat. 1888, Sec. 2799) is quoted in full in the report of the principal case on pages 419-20, *supra*.

Under this statute, where a married woman made an assignment of a policy upon the life of her husband, which was payable to her, and, in case of her not surviving her husband, to her children, but died before her husband, it was held that the children's interest was not affected by the assignment; and a doubt was expressed whether a valid assignment could be made under any circumstances: *Connecticut Mut. Life Ins. Co. v. Burroughs* (1867), 34 Conn. 305. Where a similar policy, after the wife's death, was surrendered by the husband, and a policy for his own benefit substituted, the children were awarded the insurance money, in spite of the claims of creditors: *Chapin v. Fellowes* (1869), 36 Id. 132. A policy substituted in the same manner for one in favor of the insured's betrothed, without her knowledge or consent, and assigned to a creditor, still belonged to the original beneficiary, and she was entitled to its proceeds, less the amount of premiums paid by the creditor: *Lemon v. Phoenix Mut. Life Ins. Co.* (1871), 38 Id. 294.

In *Delaware* (Laws, 1874, Ch. 76, Sec. 3), a married woman is given the

right to insure her husband's life, free from the claims of creditors, except when the annual premium exceeds \$150.

The *Florida* statute (McClellan's Dig., Ch. 104, Sec. 22) is most sweeping in its terms, providing that "whenever any person shall die in this State, leaving insurance upon his or her life, the said insurance shall inure exclusively to the benefit of his or her child or children, husband or wife, in equal portions, or to any other person or persons for whose use or benefit said insurance is declared in the policy, and the proceeds thereof shall in no case be liable to * * * creditors of the person whose life was so insured, unless said policy declares that said insurance was effected for the benefit of such creditor or creditors."

By this statute a policy, written "for the benefit of the estate of the insured," at once inured to the benefit of his only child, his wife being dead, and no interest in the policy passed to his assignee in bankruptcy: *Pace v. Pace* (1882), 19 Fla. 438. And where two policies were made payable to the insured, and he subsequently, not being indebted, placed on each a direction to pay the proceeds to a particular person, such direction was valid as against the claims of subsequent creditors: *Eppinger v. Canipa* (1883), 20 Id. 262.

The *Georgia* Code, Sec. 2820, provides that "the assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction, given and assented to by the insurer, no other person can defeat the same."

In *Rawson v. Jones* (1874), 52 Ga. 458, this provision is recognized as protecting a policy in favor of wife or children from the claims of creditors. It is, however, there held that the proceeds of a policy, made payable to the "heirs, executors, administrators or as-

signs" of the insured, constitute assets of his estate and are liable for his debts. But a policy payable originally to the wife, becomes her property, and she cannot make a valid assignment of it to a creditor of her husband, to secure the latter's debt, nor can she ratify such an assignment, without additional consideration, after her husband's death: *Smith v. Head* (1885), 75 Ga. 755.

The *Illinois* statute is as follows: "It shall be lawful for any married woman, by herself and in her own name, or in the name of any third person, with his assent as her trustee, to cause to be insured, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving such period or term, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of her husband, or any of his creditors; *provided*, however, that if the premium of such policy is paid to any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of said creditors, subject, however, to the statute of limitations." Starr & C. Ann. Stat., Ch. 73, Sec. 111. It has been held by the Supreme Court of Illinois that, under this statute, an assignment by an insolvent debtor to his wife of a policy issued in his own favor, is valid as against his creditors: *Cole v. Marple* (1881), 98 Ill. 58.

The only *Indiana* statute (Rev. Stat. Sec. 3848) which is in point, is restricted to certificates and policies in beneficiary societies, but the Supreme Court of that State has held, in a case of much interest, that an insurance policy, taken out by a husband for his wife's benefit, is her individual property, and is not subject to his debts, un-

less in a case of gross fraud: *Pence v. Makepeace* (1879), 65 Ind. 345. In his opinion in this case, HOWK, J., places the decision upon broad grounds of public policy, using the following language:

"Where it appears, as it does in this case, that the policy of insurance has been procured and taken out by a husband and father upon his own life, and has been made payable to his wife, with the evident and only view and purpose of making suitable and necessary provision for the comfort, support and maintenance of his wife and family, after his removal by death, we would hesitate long, before we could be induced to hold and decide that the proceeds of the policy, or any part thereof, might be diverted from the beneficiary named in the policy, and applied to the payment of the debts of the assured. The procurement of a policy of life insurance, as a provision for the family of the assured, in the event of his death, and the payment of premiums thereon by a person insolvent or of limited means, whose wife and family may be dependent upon him and his labor for the comforts and even the necessities of life, are acts to be fostered and encouraged by the law. For these acts are not hostile to, but we think are in full accordance with, those provisions of our law, which bear upon the rights and duties incident to the family relation. Society cannot be benefited by the abject poverty or destitution of any family; but, on the contrary, its welfare or well-being is largely dependent upon the welfare or well-being of each and every family. A necessary provision for his own household is a duty enjoined upon every man, by divine as well as human law, and, unless the acts of a party in making such provision * * * are clearly and grossly fraudulent, we would be very loth to divert such provision, or any part thereof, from the purpose for

which it was intended, and, leaving the widow and the orphan destitute, apply such provision, or a part thereof, to a purpose never contemplated."

Iowa (Rev. Code, 1888, Secs. 1182, 2372) exempts from liability for the debts of the insured, not only the "avails of any life insurance," but also endowment policies, "payable to the assured on attaining a certain age."

Kansas (Dassler's Comp. Laws, Ch. 50a, Sec. 77) exempts all policies "for the benefit of any woman, whether married or unmarried, or for the benefit of minor children, or for the benefit of any invalid, aged, or infirm person," with the limitation that "such policy of insurance, reserve or present value thereof, thus exempt, shall not exceed in amount a sum that may be purchased at the age of thirty years on the continuous payment life rate American mortality, interest four and one-half per cent., net premium, \$500."

Kentucky (Act of March 12, 1870, Secs. 30-1-2, Gen. Stat., ed. 1888, App. pp. 40-1) exempts policies "assigned, transferred or made payable to" the wife, for her benefit, or for that of any third person, subject to the same proviso that is contained in the Illinois statute. Prior to this act such policies were liable for the insured's debts: *Stokes v. Coffey* (1872), 8 Bush (Ky.), 533. But since the act they are exempt: *Thompson v. Cundiff* (1875), 11 Id. 567. In the latter case, however, the Court "doubtingly" awarded to creditors the amount of premiums paid before the passage of the act, with interest.

Louisiana has no statute, but it has been held in that State that, "a husband has the right to insure his life in the interest of his wife and child, as well as in the interest of his creditor, and his obligation to provide for them, in case of his death, is certainly well recognized. If the policy issues to the

wife, or is properly transferred to her, the amount stipulated therein belongs to her when the event insured against happens; and she cannot be forced to inventory it as part of her husband's estate. The object he had in view would be defeated if a contrary doctrine prevailed. It is the wife whom the husband seeks to protect when he insures his life in her behalf. * * * He has no need to protect his creditors by such a mode, for they can protect themselves." *Succession of Hearing* (1874), 26 La. An. 326. This decision has been followed in cases where the premiums had been paid out of community funds: *Successions of Clark* (1875), 27 Id. 269; *Succession of Bofenschen* (1877), 29 Id. 711; and, where the husband, without the knowledge of the wife, substituted for a policy in her favor one in favor of himself, the insurer was held, upon the insured's death, to be liable to the wife for the amount of the insurance, less the premiums paid on the substituted policy: *Pilcher v. New York Life Ins. Co.* (1881), 33 Id. 322.

The *Maine* statute provides (Rev. Stat. Ch. 49, Sec. 94,) that, "life and accident policies, and the money due thereon, are exempt from attachment, and from all claims of creditors, when the annual cash premium does not exceed \$150; but, when it exceeds that sum, and the premium was paid by the debtor, his creditors have a lien on the policies for such sum over \$150 a year, as the debtor has paid for two years, subject to any pledge or assignment thereof made in good faith." In *National Life Ins. Co. v. Haley* (1886), 78 Me. 268; 3 C. 25 AMER. LAW REGISTER, 613, the same question arose that was considered in the last cited Louisiana case, and was decided the same way. But the proceeds of the substituted policy were, in this instance, divided in proportion to the amount of

premiums paid before and after the substitution, the Court citing with approval the rule followed by WALLACE, J., in *Timayenis v. Union Mut. Life Ins. Co.* (U. S. C. Ct., S. D. N. Y., 1884), 21 Fed. Repr. 223.

The original *Maryland* statute was adopted in 1862 (Pub. Gen. Laws, Art. 45, Ch. 9, Sec. 8), and was almost identical in terms with that of Illinois, with the proviso omitted. Afterwards, by the Act of 1878 (Id. Sec. 200), it was provided that "all policies of life insurance upon the life of any person * * * taken out for the benefit of, or *bona fide* assigned to, the wife or children, or any relative dependent on such person, or any creditor, shall be vested in such wife and children, or other relative or creditor, free and clear from all claims of the creditors of such insured person." The latter act is an enabling, not a restraining act, and does not take away any rights given by the former: *Elliott v. Bryan* (1885), 64 Md. 368. Under the Act of 1878, a voluntary assignment of a life policy by a father to his sons is valid as against creditors: *Earnshaw v. Stewart*, Id. 513. In *Whitridge v. Barry* (1874), 42 Id. 140, S. C. 15 AMER. LAW REGISTER, 339, it was held that a married woman might make a valid assignment of a policy on the life of a husband to secure the latter's debt, but that such assignment would be void, if executed in consequence of duress on the part of the husband.

Massachusetts (Pub. Stat. Ch. 119, Sec. 167) exempts not only all policies, either issued or assigned to a married woman, but also policies "effected by any person on his own life or the life of another, expressed to be for the benefit of such other or his representatives or a third person." Provision is made for the appointment of a trustee, as in the English statute, and the proviso as to payments with intent to defraud

creditors is identical with that of Illinois. Subsequent to the adoption of the statute, it was held that the assignee of a policy, payable to the assured, his executors and assigns, for the use of his wife and children, but assigned by him in his life-time for a valuable consideration, might maintain an action against the insurer: *Burroughs v. State Mut. Life Assr. Co.* (1867), 97 Mass. 359. But such a policy cannot be affected by the will of the assured, and his executor must account to the widow and children for its proceeds: *Gould v. Emerson* (1868), 99 Id. 154. Nor will the assignment of the wife, when she does not survive her husband, affect the children's interest: *Knickerbocker Life Ins. Co. v. Witt* (1868), Id. 157. And where the policy itself stipulated that no assignment should be made, "except for the benefit of the wife or children of the assured," an assignee of the insured takes no interest, but is entitled to be repaid the premiums paid after the assignment; *Unity Mut. Life Assr. Asso. v. Dugan* (1875), 118 Id. 219. But a policy payable to the "heirs or representatives" of the assured, is not for the benefit of a third person within the meaning of the statute and its proceeds are assets for the payment of creditors: *Wason v. Colburn* (1868), 99 Id. 342.

The original *Michigan* statute (Act of 3 April, 1848, Howell's Ann. Stat., Secs. 6300-1) restricted the exemption to policies where the annual premium did not exceed \$300. But the later Act (Howell's Ann. Stat., Sec. 4238) contains no such restriction and the exemption extends to all insurance for the benefit of the wife or children of the insured, and to the insurance by a married woman of the life "of any other person."

Minnesota has no statute, except in reference to beneficiary societies (Stat., Vol. 1, Tit. 6, Sec. 369) and co-operative associations, incorporated under a

special act (Stat., Vol. 2, Tit. 6, Sec. 369 q). But it has been held in that State that a husband has no power to surrender a policy issued in favor of his wife or children: *Ricker v. Charter Oak Life Ins. Co.* (1880), 27 Minn. 193; or assign to a creditor such a policy, even though his wife join in the assignment: *Allis v. Ware* (1881), 28 Id. 166.

Mississippi provides (Rev. Code, Sec. 1261) that "the amount of any life insurance policy, not exceeding \$10,000, upon any one life, shall inure to the party or parties named as the beneficiaries thereof, freed from all liability for the debts of the person paying the premiums thereon."

The original *Missouri* statute (Rev. Stat., Secs. 5978-9) is in the exact words of that of Illinois, the proviso limiting the annual premiums allowed to be paid out of the funds of the husband to \$500. By the revision of 1879 this limit was increased from \$300, which it had previously been. But the later Act (Rev. Stat., Sec. 5981) contains no proviso, and also authorizes the appointment of a trustee, as in Massachusetts. Sec. 5980 of the Rev. Stat. confers upon an unmarried woman the same right to insure the life of her father or brother as a married woman possesses in regard to her husband's life.

In *Charter Oak Life Ins. Co. v. Brant* (1871), 47 Mo. 419, it was held that the statute did not protect a policy where the annual premium was more than \$300, and that an assignment of such a policy by husband and wife to creditors of the former gave the creditors the right to receive the whole of the insurance money. In *Baker v. Young* (1871), Id. 453, it was further held that the statute did not impair the power of husband and wife together to assign a policy for the wife's benefit during the life-time of both. And where some of the premiums were paid by the husband, when solvent, and the remainder after

he had become insolvent, the annual payment being in excess of \$300, the proceeds were divided between his widow and his creditors, in proportion to the amount of premiums paid by him while solvent and insolvent, the Court ruling that the statute was only intended to apply to a husband in embarrassed or insolvent circumstances, and that insurance paid for by him while solvent, was the property of his wife, no matter how large the premium, and under no circumstances could be made liable for his debts: *Pullis v. Robison* (1880), 73 Id. 201. In *Chapman v. McIlwraith* (1882), 77 Id. 38, a husband, not being indebted, made a parol assignment to his wife, without consideration, of a policy of insurance on his own life. He continued to pay the premiums until his death, meanwhile having become insolvent. The annual premium appears to have been less than \$300. It was held that the assignment was valid as against creditors, there being no fraudulent intent shown, and the Court saying: "It was the original and legitimate purpose of life insurance to provide for the widow and orphans, on the death of those upon whose exertions, while living, they depended for support."

Neither *Nebraska* nor *Nevada* has any statutory provision upon the subject under consideration, nor do any of the questions involved appear to have been before the courts of either State.

In *New Hampshire* (Gen. Laws, Ch. 175, Secs. 1-3) there is a general exemption of all policies for the benefit of married women, as well as policies "effected by any person on his own life or the life of another, expressed to be for the benefit of a third person," unless "procured with intent and to the effect to defraud creditors," in which case the creditors are entitled to the amount of the premiums only. It has been held in New Hampshire that an assignment by a married woman of a policy on her

husband's life as security for his debt, is a contract made by her as surety or guarantor for him, and, therefore, not binding on her; also that a husband has no power to assign such a policy: *Stokell v. Kimball* (1879) 59 N. H. 13.

New Jersey, by Act of 19 February, 1851 (Rev. Stat. p. 640. 20-1), exempts generally all insurance for the benefit of a married woman upon the life of her husband. Under this act, it has been held that where a married woman insured her husband's life for the benefit of her children, and afterwards assigned the policy to a creditor of the husband, who paid the subsequent premiums, the children were entitled only to the value of the policy at the time of its assignment: *Lantrum v. Knowles* (1871), 22 N. J. Eq. 594. And where a policy in favor of wife and children was assigned by the husband and wife together to secure a debt of the former, the assignment was held to vest in the assignee the right to the proceeds, upon the husband's death in the life-time of his wife: *De Rouge v. Elliott* (1873), 23 Id. 486. By a subsequent statute (Act of 8 April, 1875, Rev. Stat., p. 640. 22) a married woman is given the same power to assign life policies as if she were single.

The *New York* statute (Acts of 1840 and 1858, Rev. Stat., 8th ed., 1889, pp. 2600-2) is identical with that of Illinois, except the proviso, which is as follows: "But when the premium paid in any year out of the property or funds of the husband shall exceed \$500, such exemptions from such claims shall not apply to so much of said premium so paid as shall be in excess of \$500, but such excess, with the interest thereon, shall inure to the benefit of his creditors." By the later Act of 1870 (Rev. Stat., p. 2604), a married woman may surrender her interest in a policy "in the same manner as required by law to pass her dower right in lands of her

husband," or, upon dying without issue, may dispose of the same by will. And by the Act of 1879 (Rev. Stat., p. 2605) a married woman and her representatives, with the written consent of her husband, are given power to assign such a policy. Prior to this Act an assignment of a policy by a married woman was invalid: *Eadie v. Slimmon* (1862), 26 N. Y. 9; *Barry v. Equitable Life Assr. Soc.* (1875), 59 Id. 587; *Barry v. Bruene* (1877), 71 Id. 261; *Baron v. Brummer* (1885), 100 Id. 372; *Whitehead v. New York Life Ins. Co.* (1886), 102 Id. 143. But where such an assignment was made and no subsequent premiums were paid or tendered by the wife, the invalidity of the assignment did not prevent a forfeiture: *Frank v. Mut. Life Ins. Co. of New York* (1886), Id. 266. The joining of the husband in a written assignment is a sufficient "written consent" to meet the requirements of the Act of 1879: *Anderson v. Goldsmidt* (1886), 103 Id. 617. Where, however, a policy is assigned or made payable to the wife only, she might, prior to the Act of 1879, make a valid assignment: *Moehring v. Mitchell* (1846), 1 Barb. Ch. (N. Y.) 264; *Olmsted v. Keyes* (1881), 85 N. Y. 593. In a recent case in the Superior Court of New York City the statutes and decisions bearing upon the right of a married woman to assign a policy in her favor will be found thoroughly considered in opinions by both the majority and minority of a divided Court: *Brick v. Campbell* (1887), 54 N. Y. Super. Ct. 305. It has been held in New York that a father has no power to surrender a policy on his own life, taken out by him in favor of his children: *Garner v. Germania Life Ins. Co.* (1881), 110 N. Y. 266.

The *North Carolina* constitutional provision has already been given on page 433, *supra*. It has been held in that State that a child, for whose benefit

a father has insured his life, takes a vested interest in the policy: *Conigland v. Smith* (1878), 79 N. C. 303; and that the father has no power to surrender such a policy: *Hooker v. Suggs*, S. Ct. N. C., Feb. 26, 1889.

Ohio (Rev. Stat., ed. 1884, Secs. 3628-9) exempts insurance on his life effected by any person for the benefit of his widow and children, or of either, as well as insurance effected by any married woman on the life of her husband. In the former case, the statute contains a provision that "the amount of premium annually paid on such policy shall not exceed the sum of \$150, and, in case of such excess, there shall be paid to the beneficiaries named in the policy such portion of the insurance as the sum of \$150 will bear to the whole annual premium, and the residue to the representatives of the deceased;" and, where the insurance is effected by the wife, it is provided that, "if a policy be procured by any person with intent to defraud his creditors, an amount equal to the premium paid thereon, with interest, shall inure to the benefit of his creditors, subject, however, to the statute of limitations." The statute also gives to a married woman, to whom a policy is payable solely for her own use, the power to sell, assign or surrender the same, the party whose life is insured concurring in and becoming a party to the transfer. By this statute, a policy taken out in the name of a married woman on the life of her husband becomes her separate property, and she is to be treated, in regard to such policy, as a *feme sole*: *Fraternal Mut. Life Ins. Co. v. Applegate* (1857), 7 Ohio St. 292. And the statute applies as well to a policy issued by a company organized and conducted outside the limits of Ohio as to one issued by a company of that State: *Cross v. Armstrong* (1887), 44 Id. 613.

Oregon has no statute, nor reported

decisions, bearing upon the subject under consideration.

In *Pennsylvania* the Act of 15 April, 1868 (P. L. 103, Purd. Dig. p. 924) provides that "all policies of life insurance or annuities upon the life of any person, which may hereafter mature, or which have been or shall be taken out for the benefit of, or *bona fide* assigned to the wife or children of any relative dependent upon such person, shall be vested in such wife or children or other relative, free and clear from all claims of the creditors of such person." The Act of 1 May, 1876, Sec. 25 (P. L. 59, Purd. Dig. p. 914), also provides that policies issued by companies under that Act for the benefit of any married woman "shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors. If the premium is paid by any person with intent to defraud his creditors, an amount equal to the premiums so paid, with interest, shall inure to their benefit." The *Pennsylvania* cases of *Elliott's Appeal* (1865), 50 Pa. 75, which arose before the Act of 1868, and *McCutcheon's Appeal* (1881), 99 Id. 133, arising after that Act, are fully considered in the opinion of the Supreme Court in the principal case on pages 428-9, *supra*. In the case of *Trough's Estate* (1871), 8 Phila. (Pa.) 214, the question whether an assignment to the children of the insured of a life policy for \$3000, issued and paid for prior to 1868, constituted a fraud on creditors, was considered by the Court of Common Pleas in an opinion by ALLISON, P. J., who said: "There is nothing to call in question the honesty and good faith of the transaction, nor is the provision, which, by the assignment, was made for certain of the children of the assignor, unreasonable, nor was it made in contemplation of insolvency, or with an intent to de-

fraud creditors. That a provision for children under such circumstances is valid, ought not, under the settled law, to be questioned. So far from the law condemning such deeds as void, post-nuptial settlements even are supported in equity without the intervention of a trustee. When they are fairly made, and the provision is reasonable, the husband and not being in debt at the time, and they are free from any badge of fraudulent intent, they will be upheld; and what a husband may do for his wife, a father may certainly do for his children.

* * * The only possible claim the creditors could sustain in the premises would be for the amount of premiums paid by Trough to keep the policy alive, after he became insolvent. Whatever sum of money was appropriated by him to secure this end, which was of right the money of his creditors, ought to be taken from the fund in dispute, and returned to them now; but this does not give to creditors any just claim to the remaining part of the \$3000." This case was reversed in the Supreme Court, but upon an entirely different point: *Trough's Estate* (1874), 75 Pa. 115; S. C., 14 AMERICAN LAW REGISTER, 122. In a recent case it has been held that, where a policy was payable to a wife, and, in case of her death before her husband, to her children, an assignment by husband and wife does not affect the children's interest: *Brown's Appeal*, S. Ct. Pa., April 8, 1889.

Rhode Island (Pub. Stat., ed. 1882, Ch. 166, Secs. 21-2) exempts insurance "which shall not exceed in the aggregate the sum of \$10,000," on the life of any person for the benefit of a married woman, and authorizes the appointment of a trustee to hold and manage such policy or its proceeds. Under this statute, the fact that the wife has filed a petition for divorce, which is pending and undetermined at the maturity of a policy on her husband's life payable to

her, will not estop her from demanding the proceeds of such policy: *Aetna Life Ins. Co. v. Mason* (1884), 14 R. I. 583. An assignment of a policy, payable to the wife and children of the insured, which is made by the insured and his wife to secure a debt of the former, passes only the interest of the wife, and does not affect that of the children, each of whom is entitled to receive an equal share with the assignee, of the proceeds of the insurance: *Connecticut Mut. Life Ins. Co. v. Baldwin* (1885), 15 Id. 107.

South Carolina has no statute, nor reported decisions, bearing upon the subject under consideration.

The Code of *Tennessee* (Sec. 3135) provides that "a life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of his creditors." This statute does not deprive a husband of the right to assign a policy on his own life to a creditor, but the latter can retain out of the proceeds only the amount of his debt and the premiums paid by him to keep the policy alive: *Rison v. Wilkerson* (1856), 3 Sneed (Tenn.) 565. Such a policy may be disposed of by will: *Williams v. Corson* (1875), 2 Tenn. Ch. 269; S. C. (1876), 9 Baxt. (Tenn.) 516; *Tennessee Lodge v. Ladd* (1880), 5 Lea (Tenn.) 716. But a policy payable to the "legal heirs" of the insured, is not assignable by him: *Gosling v. Caldwell* (1878), 1 Lea (Tenn.) 454.

Texas has no statutory provision, but the Supreme Court of that State has held that, where a policy is made payable to the "heirs or assigns" of the insured, the latter may assign it in his life-time, but, if he does not do so, his heirs are entitled, upon his death, to the proceeds as against creditors: *Mullins v. Thompson* (1879), 51 Tex. 7. In *Levy v. Taylor* (1886), 66 Id. 652, the right of a wife to the proceeds of a

policy originally issued in her favor, but renewed in favor of a creditor, was involved, but was left by the Court undecided.

The original *Vermont* statute of 1849 (Rev. Laws, ed. 1880, Secs. 2340-1), was in the same words as that of Illinois, with a clause restricting the exemption to cases where the annual premium did not exceed \$300. By the same Act (Rev. Laws, Sec. 2344) an unmarried woman was given the right to cause to be insured the life of her father or brother "as provided in case of married women." The Act of 1856 (Rev. Laws, Secs. 2343-5), contains no restriction and broadly exempts all policies effected by one person on the life of another and expressed to be for the benefit of the latter. This Act also authorizes the appointment of a trustee to hold and manage the interest of a married woman in her policy or its proceeds. By the Act of 1880 (Rev. Laws, Sec. 2342), a wife is given the power to assign or surrender a policy in her favor on her husband's life, with the written consent of the latter.

Virginia has no statute, but it has been held in that State that the payment of premiums by an insolvent is fraudulent as to creditors, and that, so far as his means are thus withdrawn from his creditors, they are entitled to have the amount so paid applied to their claims, from the proceeds of the policies: *Stigler v. Stigler* (1883), 77 Va. 163. But it would seem that an exemption allowed by the charter of the insuring company, such as is cited on page 418, *supra*, would be sustained by the courts: *Whitehurst v. Whitehurst* (1887), 83 Id. 153.

West Virginia has no statute, nor does the question under consideration seem to have arisen in the courts of that State.

The *Wisconsin* statute (Rev. Stat., ed. 1878, Sec. 2347), exempts all insur-

ance for the benefit of a married woman, providing, however, that "if the annual premium on any such policy shall exceed the sum of \$150, and is paid by any person with intent to defraud his creditors, an amount equal to the premiums so paid in excess of said sum, with interest thereon, shall inure to the benefit of such creditors, subject, however, to the statute of limitations." It has been held in *Wisconsin* that one who procures insurance on his own life, and pays the premiums, may dispose of such insurance by will, assignment, or otherwise, to the exclusion of the beneficiary: *Clark v. Durand* (1860), 12 Wis. 223; *Kerman v. Howard* (1868), 23 Id. 108; *Foster v. Gile* (1880), 50 Id. 603. But the case is different with a certificate in a mutual benefit society, whose object is "to establish a widows' and orphans' fund": *Ballou v. Gile* (1880), Id. 614. A married woman may assign a policy upon her husband's life in her favor: *Archbald v. Mutual Life Ins. Co. of Chicago* (1875), 38 Id. 542.

From the foregoing review of the statutes and decisions in the various States, it will be seen that the tendency has been steadily in the direction of extending the exemption of life insurance policies, issued or assigned to the wife or children of the insured, from the claims of creditors. Both Legislatures and Courts are inclined to view such policies, in the language of Judge Howk, cited *supra*, as "a necessary provision for (the insured's) own household," "to be fostered and encouraged by law." In the principal case the Supreme Court of the United States falls in with this tendency, putting its decision upon the express ground of "public policy," and in so doing it is clearly in accord with the weight of authority. But the opinion of the Court also recognizes that the right of a debtor to thus make a reasonable provision for those dependent

on him after his death, must not be abused. As soon as that provision becomes tainted with a fraudulent intent, it is no longer entitled to protection. What will constitute fraud, when not defined by statutes, must be determined by the facts of each particular case, as tested by the conscience of a chancellor or the verdict of a jury.

There is a conflict of authority as to the proper rule, in the absence of statutory regulation, to be observed, when creditors are permitted to come in upon the fund. It has been more often held that they were entitled only to the amount of the premiums paid by the insolvent, with accrued interest. This is the ruling of the principal case, and in *Fena National Bank v. United States Life Ins. Co.* (U. S. C. Ct., S. D. N. Y., 1885), 24 Fed. Repr. 770, which is there cited, it is said by WHEELER, J.: "The amount due on the policy does not represent the property of the husband, nor any part of his estate, beyond the amount of the premiums. The insurance was upon (the wife's) interest in his life, not the creditor's interest in his life, and the amount due represents her interest, and, beyond the amount of the premiums, is hers. An amount equal to the amount of the premiums may represent so much of his estate, and in equity belong to his creditors. They may * * * reach that amount, but there appears to be no fair

ground on which they can reach more."

The contrary view, which would give the creditors the entire proceeds of the insurance, is sustained by an elaborate argument and review of the authorities in the case of *Fearn v. Ward* (1886), 80 Ala. 555, which was a second hearing of the case in 65 Ala. 33, cited on page 433, *supra*. But the former rule seems the more equitable, and has been generally adopted in the statutes.

The consideration of this case has necessarily led us some distance into the question of the assignment of policies, originally written for the benefit of the insured's wife and children, although it has not been attempted to treat that branch of the subject at all exhaustively. In a well-considered and interesting case the Supreme Court of the District of Columbia has recently passed upon the question of a wife's power to assign an ordinary paid up policy of life insurance, effected by her husband on his own life for her benefit, and it has been held that she has such power: *Ford v. Travelers' Ins. Co.* (1888), 6 Mack. (D. C.) 384. There will be found in 24 AMERICAN LAW REGISTER, 753, an article on "Assignments of Life Insurance Policies," in which the authorities bearing upon the subject are collected with great care and thoroughness, and are elaborately considered.

JAMES C. SELLERS.

ABSTRACTS OF RECENT DECISIONS.

ADMIRALTY.

Damages for death, caused by negligence on the high seas, cannot be recovered in the admiralty courts of the United States, although the vessel proceeded against is a foreign one. *The Alaska* S. Ct. U. S., April 1, 1889.

ALIENS.

Lands cannot be inherited in the District of Columbia by an alien from a citizen of the U. S. *De Geoffroy v. Riggs*, S. Ct. D. C., July 8, 1889.

ARBITRATION.

Incomplete award, which does not cover all the matters included in the submission, is absolutely and altogether void. *Hamilton v. Hart*, S. Ct. Pa., April 1, 1889.

BANKS AND BANKING.

Exchange purchases, when used in a contract between two banks, by which one of such banks is authorized to draw in advance upon the other "against exchange purchases," does not include the former bank's own drafts on third persons; and collateral deposited with the latter bank to secure advances made under the contract, is not subject to any lien for such drafts, if protested for non-payment. *Reynes v. Dumont*, S. Ct. U. S., April 8, 1889.

BILLS OF LADING.

Exemption of carrier from liability for loss caused by the negligence of its servants, will be held invalid in the Federal Courts, although the law of the State where the contract was executed may be otherwise. *Liverpool and G. W. Steam Co. v. Phenix Ins. Co.*, S. Ct. U. S., March 5, 1889.

Loss by perils of the sea, when exempted by a clause limiting the liability of a common carrier, does not cover a loss caused by one of such perils, to which the negligence of the carrier's servants contributed. *Id.*

Through bill, under which goods were shipped from an inland point, contained two sets of conditions, the first relating exclusively to land carriage by certain railroads, and the second to ocean transportation by steamer; the owner of the steamer could not avail itself of a clause contained in the first set of conditions, giving the carrier the benefit of any insurance on the goods for the loss of which it should be liable. *Id.*

BILLS AND NOTES.

Indorsement by trustees of a promissory note in their own names, adding the words "Trustees Estate of—," without a stipulation

that the trust estate alone should be responsible, renders them personally liable, and it makes no difference that they were empowered and directed by the will constituting the trust to make such indorsement. *Roger Williams Nat. Bank v. Groton Mfg. Co.*, S. Ct. R. I., March 16, 1889.

Note of corporation, appearing on its face to have been executed by its president in his own favor, is in itself sufficient to charge an indorsee with notice of any want of authority to execute it. *Smith v. Los Angeles I. & L. Co op. Asso.*, S. Ct. Cal., Feb. 27, 1889.

CONSTITUTIONAL LAW.

Exemption from taxation of poor-farm by township, may be made by the legislature, although such taxation is expressly authorized by an existing statute, subsequent to which the poor-farm was conveyed by the township to a municipal corporation, in which the township itself became merged; the grant of the power to tax did not constitute, by reason of the subsequent conveyance, a contract between the township and the corporation, which the legislature could not impair. *Williamson v. State of New Jersey*, S. Ct. U. S., April 1, 1889.

CRIMINAL LAW.

Citizen of United States, living in a foreign country, under a treaty between the United States and that country, being charged with a crime committed in a State of the United States, the government declined to request his surrender, there being no extradition treaty between the two countries, but the alleged criminal was surrendered to a police agent by the foreign government, at the request of the governor of the State, and was brought on for trial; the State Court, having jurisdiction of the offence charged, had jurisdiction to try him upon his being brought before it, even though the act of the governor may have been illegal. *People v. Pratt*, S. Ct. Cal., March 7, 1889.

Drinking by jury of intoxicating liquor, while deliberating on their verdict in a prosecution for murder, is cause for setting aside the verdict, and it is not necessary to show that the accused was actually injured thereby. *People v. Lee Chuck*, S. Ct. Cal., March 5, 1889.

Narration of transaction, given by the injured man a few minutes after its occurrence, and after the accused had left, is not admissible in evidence, in a homicide case, as part of the *res gestæ*. *Estell v. State*, S. Ct. N. J., March 2, 1889.

DEED.

Reformation of description, so as to cover a smaller quantity of land, will be decreed only when the evidence shows beyond controversy that the mistake alleged was mutual. *Andrews v. Andrews*, S. Jud. Ct. Me., Feb. 25, 1889.

EQUITY.

Specific performance of an agreement to take care and provide for a complainant in case of her "general debility or sickness" will not be compelled. *Mowers v. Fogg*, Ct. Ch. N. J., March 21, 1889.

EVIDENCE.

Judicial notice will not be taken in the courts of the United States of a statute of Great Britain, unless the same has been pleaded and proved. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, S. Ct. U S., March 5, 1889.

Parol evidence of the circumstances surrounding the parties to a written contract at the time of its execution, where the language used leaves the subject-matter in doubt, is admissible for the purpose, not of changing or altering its meaning, but of throwing light on its language and ascertaining its true meaning. *Mason v. Spalding*, S. Ct. D. C., Jan. 21, 1889.

Secondary evidence of the contents of a paper may be given, when the same is in Court and the party holding it refuses a demand for its production, although no notice to produce has been given before the trial. *Overlock v. Hall*, S. Jud. Ct. Me., Feb. 25, 1889.

FIRE INSURANCE.

No insurable interest is had by a husband in his wife's real estate, conveyed by him to her, where the statute renders a married woman's property, real or personal, however acquired, her separate estate, regardless of her husband's consent, and only requiring his joinder with her in the conveyance of property derived from him. *Clark v. Dwelling-House Ins. Co.*, S. Jud. Ct. Me. March 12, 1889.

HUSBAND AND WIFE.

Pension money, received from the United States Government by a husband, may be given by him to his wife for the purpose of purchasing a home, in her name, for their joint benefit, and the property so purchased will not be subject to the claims of the husband's creditors. *Holmes v. Tallada*, S. Ct. Pa., March 25, 1889.

Presumption of death, arising from the absence of a husband for seven years, may be rebutted, and a second marriage by the wife, made upon the strength of such presumption, is void, if the husband was in fact alive at the time, and the wife takes no civil rights by such second marriage. *Thomas v. Thomas*, S. Ct. Pa., March 18, 1889.

JURISDICTION.

Appeal or error to the Supreme Court of the United States, under a statute limiting the right to appeal to cases where the matter in dispute, exclusive of costs, exceeds \$5000, will not lie, where the judgment is for \$5000 and costs, but not with interest. *District of Columbia v. Gannon*, S. Ct. U. S., April 1, 1889.

MARINE INSURANCE.

Right of subrogation inures to an insurance company, when the goods insured have been shipped on a steamer and lost at sea through the negligence of the carrier, and the insurance on them has been paid by the company to the shipper. *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, S. Ct. U. S., March 5, 1889.

MECHANICS' LIENS.

Railroad company cannot claim exemption on grounds of public policy from liens for work and labor performed in the erection of a bridge. *Purtell v. Chicago Forge & Bolt Co.*, S. Ct. Wis., April 25, 1889.

NOTARY PUBLIC.

Surety on official bond of notary public was sued for a loss arising under the following circumstances: the notary applied to an attorney who had money of a client to loan, for a loan upon the farm of the former's brother-in-law; the attorney and the notary went together to examine the farm, abstracts were furnished and a day fixed for settlement; on the day fixed the notary took the note and mortgage, which the lender's attorney had prepared, to his own house, where he stated his brother-in-law was, and soon brought it back with the names of his brother-in-law and wife signed to it and a certificate of acknowledgment before himself as notary; on his representation that he was entitled to receive the money, the attorney paid it over to him and received the note and mortgage, which proved to be forgeries. It was held that the false certificate was the proximate cause of the loss, and that therefore the surety was liable. *People v. Butler*, S. Ct. Mich., April 24, 1889.

PROCESS.

Service on holiday of a summons, also issued and tested on the same day, will not be set aside, nor will the summons be quashed. *Glenn v. Eddy*, S. Ct. N. J., March 11, 1889.

RAILROADS.

Damage by fire to crops by a locomotive being alleged, evidence that a fire sprang up immediately on the passing of a train, and that there was no fire on the premises before, and no other apparent cause for the fire, is sufficient to warrant the inference that the fire was caused by the train. *Union Pacific Ry. Co. v. De Busk*, S. Ct. Colo., March 1, 1889.

Failure to stop, look and listen, will prevent recovery for injuries sustained in crossing the track of a railroad, at a point where there were safety gates and a watchman was usually stationed, although on the night of the accident the gates, being out of order, were not lowered, and no light was displayed nor warning given by the watchman. *Greenwood v. Philadelphia, W. & B. R. R. Co.*, S. Ct. Pa., March 18, 1889.

SALE.

Delivery is a question for the jury, where it is shown that by the terms of a contract for the sale of certain personal property a part of the purchase price was to be paid in cash and the balance secured by a mortgage on the property; while the property was being delivered, the vendor demanded the cash payment and received a portion of it, and immediately after he had completed his part of the contract, he went to receive the balance of the cash, but found that the vendee had absconded; and, if it is found that the title remained in the vendor, the vendee acquires no interest in the property, not even to the extent of his cash payment. *Empire State Type Foundry Co. v. Grant*, Ct. App. N. Y., March 26, 1889.

STOCK EXCHANGE.

Seat in stock exchange is property and liable for the owner's debts, notwithstanding the provisions of the by-laws of the exchange that the property is held in trust for the members, that "no member under any circumstances shall be deemed to have or claim or possess any individual right, title, or interest in the property or assets of the association," until finally dissolved, and that every applicant for membership shall be subjected to the scrutiny of a committee, it being also provided that a member may dispose of his privileges, subject to the right of the board to reject any nominee. *Habenicht v. Lissak*, S. Ct. Cal., March 8, 1889.

TELEGRAPHS.

Receiver of message has no contractual relation with the telegraph company, and, if injured by the latter's negligence in delivering the message, his remedy is in tort. *Western Union Tel. Co. v. DuBois*, S. Ct. Ill., April 5, 1889.

TREATIES.

Supreme Court of United States has no power to set itself up as the instrumentality of enforcing the provisions of a treaty with a foreign nation, which the United States Government, as a sovereign power, has chosen to disregard. *Botiller v. Dominguez*, S. Ct. U. S., April 1, 1889.

WILLS.

Devise to executors in trust, with directions to sell the real estate and apply the funds to the use of a charitable institution not yet in existence, but which the trustees are instructed to procure to be incorporated by a special act of the legislature as soon as possible, but at least within ten years of the testator's death, is void, because of the uncertainty whether there will ever be any legatee to take, which must continue for a period not measurable by a life or lives in being, during which the ownership of the fund would be suspended. *Cruikshank v. Chase*, Ct. App. N. Y., April 16, 1889.

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MATTERS REQUIRING JUDICIAL NOTICE.

(Continued.)

XXII.

The Supreme Court of a State will take judicial notice of the times prescribed by law for holding the terms of the various courts in the State: *Lindsay v. Williams* (1850), 17 Ala. 229; *Morgan v. State* (1859), 12 Ind. 448; *State v. Hammett* (1847), 7 Ark. 492; *Gilliland v. Sellers* (1853), 2 Ohio St. 223; *Pugh v. State* (1858), 2 Head. (Tenn.) 227; and of who are the judges of the inferior courts: *Tucker v. State* (1857), 11 Md. 322; *Ex Parte Peterson* (1858), 33 Ala. 74; *Kilpatrick v. Commonwealth* (1858), 31 Pa. 198. Circuit Courts will take notice of who are justices of the peace within the county where the court is held: *Graham v. Anderson* (1867), 42 Ill. 514. But not of the official acts of a justice, offered in evidence in a county other than where he resides: *Chambers v. People* (1843), 5 Ill. 351. Notice will be taken of the terms of court, to determine whether an execution was levied in the lifetime of the writ: *Williams v. Hubbard* (1850), 1 Mich. 446. Where the Common Pleas tried a party for a felony, the Supreme Court took notice, from the time the offence was committed until the trial, and the terms of the Circuit Court, that the latter could not have been in session so as to find an indictment: *McGinnis v. State* (1865), 24 Ind. 500. Territorial courts are bound to know the officers and enforce the judgments of United States courts, within their jurisdiction: *Buford v. Hickman* (1834), Hemp. (U. S. C. Ct. Ter. Ark.) 292. But, as a general rule, superior courts will not judicially notice the customs, rules or proceedings of

inferior courts of limited jurisdiction, unless justice requires it in reviewing their decisions: *March v. Commonwealth* (1851), 12 B. Mon. (Ky.) 25. From the date, and the term of the court below, an appellate court will take notice of whether a judgment by default was prematurely rendered: *Bethune v. Hale* (1871), 45 Ala. 522.

From the commencement and duration of the terms of the Circuit Court, the Supreme Court will take notice that a specified day fell in the second week of the term: *Rodgers v. State* (1874), 50 Ala. 102. And in like manner, of what was "the twentieth judicial day" of the term of the court below, next succeeding a certain other day: *Lewis v. Wintrode* (1881), 76 Ind. 13.

XXIII.

All courts have official knowledge that proper judicial tribunals are established in the several States; and in order to give the transcript of the record or the probate of a will in a sister State in evidence, it is not necessary to show that probate and registry are required in such State: *Dozier v. Joyce* (1839), 8 Por. (Ala.) 303. The seal of a State court proves itself: *DeSobry v. DeLaistre* (1807), 2 H. & J. (Md.) 191; *State v. Snowden* (1868), 1 Brewst. (Pa.) 218. Where a deed mentions the premises, as within a certain town, not naming the State, the court will notice that the town named is within a certain county in the State: *Harding v. Strong* (1866), 42 Ill. 148. A judgment which is enjoined, will be noticed as part of the record in the proceedings: *Minor v. Stone* (1846), 1 La. An. 283. So, an order of the court entered upon the minutes, is a part of the record: *Pagett v. Curtis* (1860), 15 Id. 451.

Where there had been a reversal and a second judgment rendered, one error assigned for its reversal was, that the cause had not been remitted to the court below; and nothing in regard to it appearing from the record sent up, it was held that the appellate court would take judicial notice of its own record and proceedings on the former writ of error: *Brucker v. State* (1865), 19 Wis. 539.

Courts take judicial notice of all prior proceedings in a case, hence, on a plea in bar of "once in jeopardy," the former trial and verdict are before the court: *State v. Bowen* (1876), 16 Kan.

475. The book of records of judgments, in the same court, proves itself: *Robinson v. Brown* (1876), 82 Ill. 279. An appellate court will take notice of its own records; but, in deciding a case, will not take notice of what may be in the record of another case, unless made a part of the record in the case under consideration: *National Bank of Monticello v. Bryant* (1877), 13 Bush (Ky.) 419.

XXIV.

In an action on a transcript of a judgment of the Circuit Court of another State, the Supreme Court of Wisconsin took notice that the circuit courts of the several States are courts of general jurisdiction: *Jarvis v. Robinson* (1867), 21 Wis. 523. To support the jurisdiction of the District Court, in a case involving the claimant's right to the office of judge, the Supreme Court took judicial notice that the salary of the office exceeded one hundred dollars: *McKinney v. O'Connor* (1861), 26 Tex. 5.

The Orphans' Court of Washington county, in the District of Columbia, being created by a public statute of the United States, its seal will be judicially recognized by the courts in Maryland: *Mangun v. Webster* (1848), 7 Gill (Md.) 78.

XXV.

If, pending a suit against an executor for an accounting, the will be revoked in another proceeding, the court cannot take notice of the fact, without proof: *Daniel v. Bellamy* (1884), 91 N. C. 78. From the records of the Chancery Court, the Supreme Court will know that there never was, legally, a county of a certain name in the State: *Brown v. Elms* (1849), 10 Humph. (Tenn.) 135. Where a bill is filed ostensibly to protect the interests of the State, the court will take judicial notice of the laws of the State, even if they contradict the allegations in the bill; so held with reference to a law enabling a particular officer to qualify: *State v. Jarrett* (1861), 17 Md. 309. The court will take notice that a person, present in the grand jury room when the charge laid in the indictment was being investigated, was a duly authorized assistant United States District Attorney: *People v. Lyman* (1877), 2 Utah 30. The court will take notice of the expiration of a bank charter,

and dismiss an action pending against the bank on a dormant judgment : *Terry v. Merchants' and Planters' Bank* (1880), 66 Ga. 177.

Where it does not affirmatively appear that a statute was put in force by publication, as allowed by law, the court will recognize its existence and validity : *People v. Hopt* (1884), 3 Utah 396. Courts will take notice that a certain city is within a particular county of the State, and proof that a crime was committed in such city is sufficient to establish the fact that it was perpetrated in the county : *Sullivan v. People* (1887), 122 Ill. 385 ; *State v. Reader* (1883), 60 Iowa 527 ; *Luck v. State* (1884), 96 Ind. 16. The office of treasurer of a school district will be recognized without proof of how it was created : *State v. Dahl* (1886), 65 Wis. 510. Courts take judicial notice of the signatures of their own officers as such, but no rule extends such notice to the signatures of the parties to a cause : *Alderson v. Bell* (1858), 9 Cal. 315. Their notice of the signatures of attorneys extends only to acts done in the performance of their professional duties as attorneys, and the signature of an attorney, admitting service of summons as a defendant in the suit, is a private act which the court cannot judicially notice : *Masterson v. Le Claire* (1860), 4 Minn. 163. Where an act of the legislature, establishing a certain county, was declared unconstitutional by the Supreme Court of Tennessee, it was held that the circuit judge, in the trial of a cause, had a right to declare to the jury his judicial knowledge of such decision, and its effect in fixing the boundaries of counties : *Cash v. State* (1849), 10 Humph. (Tenn.) 111.

Where a case is reversed and remanded by the Supreme Court, and after proceedings had below, another appeal is taken ; and an appearance entered in the inferior court in the first instance has never been withdrawn, the Supreme Court will judicially know what attorneys have appeared in the cause : *Symms v. Major* (1863), 21 Ind. 443. The record in garnishee proceedings is virtually a part of the record in the cause and may be judicially noticed : *Farrar v. Bates* (1881), 55 Tex. 193. Where the facts are within the judge's knowledge, no proof is required ; as on a motion to strike a paper from the files because it was never presented to or signed by

the judge: *Sicrist v. Petty* (1883), 109 Ill. 188. A judge may take judicial notice of the existence, before his court, of a prosecution for crime against one called as a juror: *State v. Jackson* (1883), 35 La. An. 769.

Where it appears from the record, that a contract was given for contingent compensation in obtaining an act of the legislature, it is the duty of the court, of its own motion, to declare it void, as against public policy and to discountenance any attempt to enforce it: *Git v. Williams* (1857), 12 La. An. 219.

XXVI.

Courts will take judicial notice of the regular course of nature, as the revolution of the seasons in relation to vegetables and animals: *Patterson v. M Causland* (1830), 3 Bland. (Md.) 69; of the usual course of agriculture, and whether the crops of the country are matured at a certain date, so as to be removed from the soil: *Floyd v. Ricks* (1853), 14 Ark. 286; of facts of unvarying occurrence, but not of vicissitudes of climate or seasons: *Dixon v. Niccolls* (1866), 39 Ill. 372; that a mortgage given in January on a certain cotton crop, is on a crop not yet in being: *Tomlinson v. Greenfield* (1876), 31 Ark. 557; of the seasons and husbandry, and that the use of a farm is worth much more during the cropping season than for the six months including winter: *Ross v. Boswell* (1877), 60 Ind. 235.

XXVII.

Notice will be taken from the time of their ancestor's death, that his children had arrived at majority before the suit was brought: *Floyd v. Johnson* (1822), 2 Littell (Ky.) 109. With reference to a part of a ship's cargo being wet with salt water in the river Mersey, in England, it has been judicially noticed that the tide ebbs and flows in that stream to a great height: *Whitney v. Ganche* (1856), 11 La. An. 432. Courts will take notice of the ordinary computation of time and what day of the week a certain day of the month falls on: *Allman v. Owen* (1857), 31 Ala. 167; *Sprowl v. Lawrence* (1859), 33 Id. 674; *Philadelphia, &c., R.R. Co. v. Lehman* (1881), 56 Md. 209; and that a certain day falls on Sunday: *McIntosh v. Lee* (1881), 57 Iowa 356; and the difference of time in different latitudes:

Curtis v. Marsh (1858), 4 Jur. N. S. (Lond.) 1112; and of the ordinary period of gestation: *King v. Leuffe* (1807), 8 East 193.

That distilled spirits are intoxicating: *Carmon v. State* (1862), 18 Ind. 450; *Egan v. State* (1876), 53 Id. 162; *Commonwealth v. Peckham* (1854), 2 Gray. (Mass.) 514. That whisky is an intoxicating liquor: *Schlicht v. State* (1877), 56 Ind. 173; that beer is a malt liquor: *Watson v. State* (1876), 55 Ala. 158; *State v. Goyette* (1877), 11 R. I. 592; and that blackberry brandy is an intoxicating liquor: *Fenton v. State* (1884), 100 Ind. 598. Of the navigability of streams: *Neaderhouser v. State* (1867), 28 Ind. 257; *Wood v. Fowler* (1882), 26 Kas. 682.

Judicial notice has been taken, as a fact for the court and not for the jury, that a box freight car standing still at a highway crossing, will not frighten horses of ordinary gentleness: *Gilbert v. Flint, &c., R. R. Co.* (1883), 51 Mich. 488. In adjudicating upon surveys, courts are bound to notice the magnetic variation from the true meridian: *Bryan v. Beckley* (1809), 6 Littell (Ky.) 91.

XXVIII.

In an action to restrain an infringement of a patent, for preserving articles of food by the application of cold air, the court took judicial notice that the scientific principles claimed in the patent were generally known and had been long in use in the ice cream freezer, and held the patent was void for want of any novelty in their application: *Brown v. Piper* (1875), 91 U. S. 37. Courts will take judicial notice of the art of photography, the mechanical and chemical process employed, the scientific principles on which they are based, and their results: *Luke v. Calhoun Co.* (1875), 52 Ala. 115. On a trial for arson, it need not be alleged or proved that coal oil is inflammable: *State v. Hayes* (1883), 78 Mo. 307. It cannot be objected that an almanac was put in evidence to show when the sun rose on a certain day, as the court, in any event, would take judicial notice of that fact: *People v. Chee Kee* (1882), 61 Cal. 404. The courts will notice that carrying on the business of a barber on Sunday is not work of necessity, within the statute: *State v. Fredrick* (1885), 45 Ark. 347. That the superintendent of

a railroad company has authority to refuse or receive cordwood: *Sacalaris v. Eurcka & Palisade R. R. Co.* (1883), 18 Nev. 155.

Of what is meant by a "gift enterprise," upon the trial of one indicted for advertising the same: *Lohman v. State* (1881), 81 Ind. 15; for, as to judicial notice of epithets, courts have no right to be ignorant of the meaning of current phrases which everybody else understands; and so, in this action, which was by a clergyman, for libel in printing certain charges concerning him, while a candidate for Congress, the court took notice of the meaning of the following words: "Then there was that Iowa Beecher business of his, which beat him out of a station at Grass Lake:" *Bailey v. Kalamazoo Pub. Co.* (1879), 40 Mich. 251.

Courts will take notice of ordinary abbreviations, such as "admr.," for "administrator;" and of the usual abbreviation of Christian names: *Moseley v. Mastin* (1861), 37 Ala. 216; *Stephen v. State* (1852), 11 Ga. 225; *W'caver v. McElhenon* (1850), 3 Mo. 89. Where a statute prohibited the keeping of gaming tables, excepting billiard tables, the court took judicial notice of what a billiard table is, and that, under this statute, a party may be punished for allowing faro to be played on it: *State v. Price* (1841), 12 G. & J. (Md.) 260.

XXIX.

As a matter of general notoriety, courts will take notice of the peculiar nature of lotteries and the modes in which they are generally managed: *Boullemct v. State* (1856), 28 Ala. 83. Of the character of the circulating medium, and the popular language in reference to it: *Lampton v. Haggard* (1826), 3 T. B. Mon. (Ky.), 149. As affecting the rights of parties, courts will take notice of changes in the course of business in the country, and of new processes of practical utility in facilitating trade: *Wiggins Ferry Co. v. Chicago & A. R.R. Co.* (1878), 5 Mo. App. 347; and it has been held in Kentucky, that the chancellor will take notice of the prices of ordinary labor: *Bell v. Barnett* (1829), 2 J. J. Marsh. (Ky.) 516.

XXX.

In construing an instrument granting a power, where a long time has elapsed from the date of its execution, in order to carry out the intention of the parties, courts will take notice that the language of all countries is subject to fluctuation and change, and that certain terms, the meaning of which was universally known and understood at the time they were employed, may come to have an entirely different meaning: *Vanada v. Hopkins* (1829), 1 J. J. Marsh. (Ky.) 285. As the only means of determining the present value of a wife's inchoate right of dower, courts will recognize the use of "annuity tables," and adopt the "American Table of Mortality," as the standard in this country: *Goodon v. Tweedy* (1883), 74 Ala. 232.

In determining whether a trustee acted with prudence in the management of assets during war times, the courts of Alabama take judicial notice of the disturbed condition of business during that period: *Foscue v. Lyon* (1876), 55 Ala. 440.

Courts will take notice that Free-masonry is a charitable institution; and that, in a suit against his lodge, a member is not, for that reason, disqualified as a juror: *Burdine v. Grand Lodge of Alabama* (1861), 37 Ala. 478. The court will take notice of the ordinary incidents of railway travel: *Downey v. Hendrie* (1881), 46 Mich. 386.

XXXI.

There remains a vast array of facts which can become generally known only through the uniform results of experience in life. From the immense multiplicity of these matters, they may never receive, in the usual form, either historical or scientific endorsement. They lie in the region of traditional or actual knowledge, common to civilization, and may be known as "a knowledge of men and things." The rule for their judicial reception is, that "courts will not pretend to be more ignorant than the rest of mankind." Such matters can never be given in evidence by means of spoken or written language, and hence, they can leave no impression upon the record of a cause. They are noticed and considered in the trial of every question of fact; and all courts, especially those of appellate

jurisdiction, recognize this to be true. They are impressed upon the attention of trial courts in the hearing of causes, and it is because they are thus enabled to apply them, in arriving at the truth from the too often careless, perverse, or corrupt statements of the witnesses, whether conflicting, contradictory or false, that these courts are endowed with a supervisory power, even over the findings of juries, and it is made their duty to see that the verdict is sufficiently sustained by proper testimony. It may often occur that this intangible information will lay bare the motives of men and afford the only correct interpretation of the peculiar conduct of parties. In this respect, appellate courts can have no such means of enlightenment as they readily concede to the courts of first instance, and it is for this reason that they so reluctantly disturb the findings and judgments of the latter courts, upon the evidence.

XXXII.

In this connection, a number of decisions are given in which the courts refused to take judicial notice of matters which were claimed to be proper subjects therefor. While, in some instances, it may be somewhat difficult to mark the lines of distinction, the grounds of rejection will be seen, generally, to rest on the primary rules governing the subject.

The Supreme Court of California refused to take notice of the rules established by the Board of Land Commissioners or Surveyor General of the United States, forbidding original papers from being taken from the files; and refused to allow evidence of the contents of such papers, without proof of the existence of the rule: *Hensley v. Tarpcy* (1857), 7 Cal. 288. And in New York, where a question in a cause depended on the construction of several regulations of the Canal Board, the court refused to take judicial notice of them: *Palmerv. Aldridge* (1852), 16 Barb. (N. Y.) 131. The court cannot take notice of the rate of interest in another State, from a table of the same prepared by the Secretary of State and appended to the statutes, as required by law: *Clarke v. Pratt* (1852), 20 Ala. 470; *Dorsey v. Dorsey* (1831), 5 J. J. Marsh. (Ky.) 280. And the Supreme Court of Wisconsin refused to notice that there are county judges in New York, or that they have authority to

administer oaths: *Fellows v. McNasha* (1860), 11 Wis. 558. The court cannot take notice that a railroad company has a seal, other than a scrawl purporting to be a seal, which appears on an appeal bond filed by them: *Illinois Central R. R. Co. v. Johnson* (1864), 40 Ill. 35. Courts will take judicial notice of public treaties, and of the authority conferred by them on the President; but not that such authority to do an act affecting only a small number of persons, and they not citizens of the United States, has been exercised: *Dole v. Wilson* (1871), 16 Minn. 525. The courts do not take judicial notice of the various orders issued by a military commander, in the exercise of the military authority conferred upon him: *Burke v. Miltenberger* (1873), 19 Wall. (86 U. S.) 519. Courts cannot take judicial notice of the duties required of or performed by the servants of the company, in managing a railroad train, nor of the degrees of supremacy existing among them: *McGowan v. St. Louis, &c., R. R. Co.* (1876), 61 Mo. 525. Nor of the duties of officers of railroad companies: *Brown v. Missouri, &c., R. R. Co.* (1877), 67 Mo. 122. It is not the duty of the courts to take judicial notice of the various means by which public statutes are carried into effect by the executive officers of the government: *Canal Co. v. Railroad Co.* (1832), 4 G. & J. (Md.) 1.

Courts cannot judicially know that a sale of land has been made, because they are bound to know that there is a law providing for such sale: *Bledsoe v. Doe* (1839), 4 How. (Miss.) 13.

In Alabama, New Jersey and North Carolina, charters of private corporations are not judicially noticed: *City Council of Montgomery v. Plank Road Co.* (1857), 31 Ala. 76; *Perdicaris v. Trenton, &c., Co.* (1862), 29 N. J. L. 367; *Carrow v. Washington Toll Bridge* (1867), Phil. (N. C.) 118. Notice will not be taken of special acts of the legislature: *Hailes v. State* (1880), 9 Tex. Ct. App. 170. The court will not take judicial notice that a private corporation was organized under a general law: *Crawfordsville, &c., Co. v. Fletcher* (1885), 104 Ind. 97.

XXXIII.

The statute law of Great Britain now in force, or created since the Revolution, cannot be judicially noticed by our courts,

except in the same manner as the criminal laws of any other foreign state: *Ocean Insurance Co. v. Fields* (1841), 2 Story (U. S. C. Ct., D. Mass.) 59. In the absence of proof of the foreign law, showing a legal liability, a payment of debts by a stockholder for a foreign corporation will be deemed to have been a voluntary payment: *Eastman v. Crosby* (1864), 8 Allen (Mass.) 206. As our courts do not take judicial notice of foreign revenue laws, a note not stamped in accordance with the laws of the country where made, will be held valid here: *Ludlow v. Van Rensselaer* (1806), 1 Johns. (N. Y.) 94.

Giving operation to a foreign law rests in mere comity, and no court will take cognizance of a matter concerning the internal policy of another State; therefore, courts will not sustain an action on a foreign contract, where none would lie by the law of the former: *Pickering v. Fisk* (1834), 6 Vt. 102. And the Supreme Court of Michigan will not recognize the value of Canada currency, nor the rate of interest in Canada: *Kermott v. Ayer* (1863), 11 Mich. 181.

XXXIV.

The rule that courts will presume the common law to be in force in other States, is not followed in Texas, where the Supreme Court has refused to take such notice: *Bradshaw v. Mayfield* (1856), 18 Tex. 21. The New York courts will not take judicial notice that the law of any other State differs from their own: *New York Phoenix Ins. Co. v. Church* (1880), 59 How. Pr. (N. Y.) 293. In Illinois, in an action of assumpsit, evidence of the statute incorporating the Chamber of Commerce of Milwaukee, Wisconsin, with certain proceedings of the board of arbitrators, was held inadmissible: *Kelderhouse v. Savcland* (1877), 1 Bradw. (Ill.) 65.

Courts will not take judicial notice of local customs, such as the taking of one-third of the land by the locator for his services: *Longes v. Kennedy* (1812), 2 Bibb (Ky.) 607. Nor what are fair and usual commissions on acceptances, paid without funds: *Seymour v. Marvin* (1851), 11 Barb. (N. Y.) 80. Nor of the customs of a particular trade or calling, as the meaning of printers' marks or abbreviations, showing the date and number of insertions of matter in a newspaper: *Johnson v.*

Robertson (1869), 31 Md. 476. Nor the rule for the measurement of corn in the shock; nor whether a railroad car of given dimensions will not contain three hundred bushels thereof: *S. & N. A. R. R. Co. v. Wood* (1883), 74 Ala. 449. Nor that playing "policy" is playing a game of chance: *State v. Russell* (1885), 17 Mo. App. 16; *State v. Sellner* (1885), Id. 39. Nor that the words "drawing" and "Kentucky drawing," designate a game of chance: *State v. Bruner* (1885), Id. 274.

XXXV.

The Supreme Court of Indiana cannot judicially know the names of towns and cities that have adopted the general incorporation law: *Johnson v. Common Council* (1861), 16 Ind. 227. Courts cannot take notice of the width of streets and sidewalks in a city, when the same is established by ordinance: *Porter v. Waring* (1877), 69 N. Y. 250. Nor of the intersection of a street in a city with a railroad track: *Pennsylvania R. R. Co. v. Frana* (1883), 13 Bradw. (Ill.) 91. Nor that a county has adopted township organization: *State v. Cleveland* (1883), 80 Mo. 108. Where every community of two hundred inhabitants may incorporate itself into a town, the courts will not take judicial notice of such incorporation: *Temple v. State* (1883), 15 Tex. Ct. App. 304.

Where, in an instrument of conveyance of land, the name of a place is given, but not of the State where the same was made, courts will take notice of a place of the same name within the State and presume it to have been intended: *Richardson v. Williams* (1835), 2 Por. (Ala.) 239. The courts of Indiana will not take judicial notice of the division of counties and the erection of new ones by county commissioners: *Buckinghouse v. Gregg* (1862), 19 Ind. 401. Nor will courts notice the local situations of towns within a county, or their distances from each other: *Goodwin v. Appleton* (1843), 22 Me. 453. It has been held by the Supreme Courts of Missouri, Wisconsin and Texas, upon what ground does not clearly appear, that they could not take judicial notice of prominent cities in other States, as New York, New Orleans, &c.: *Riggin v. Collier* (1840), 6 Mo. 568; *Whitlock v. Castro* (1858), 22 Tex. 108; *Woodward v. Chicago, &c., R. R. Co.* (1867), 21 Wis. 309. The

Supreme Court of Indiana will not notice the existence of ferries, as they are established by the county commissioners: *State v. Hise* (1856), 7 Ind. 645. In Ohio, courts will not notice the subdivision of the refugee township; although the court will take notice, from the description, that the township is a fractional one: *Stanberry v. Nilson* (1834), Wright (Ohio) 766. The Supreme Court of Texas refused to notice that, "St. Louis, Mo.," means St. Louis in the State of Missouri; the same appearing in the date of a contract: *Ellis v. Park* (1852), 8 Tex. 205; and the same court refused notice that a note made payable in "New Orleans, La.," was meant to be payable in the State of Louisiana: *Russell v. Martin* (1855), 15 Tex. 238. It has been held that, while courts will take notice of the distances between well-known geographical points in the United States, they cannot take such notice of what would be a reasonable time for an express company to carry a sum of money from one to the other: *Rice v. Montgomery* (1866), 4 Biss. (U. S. C. Ct., D. Ind.) 75. On the other hand, it is held, with much more satisfaction, in Pennsylvania, that the ordinary speed of railway trains is a matter for judicial cognizance, and hence a very simple calculation will demonstrate, with approximate certainty, the time within which mails may be transported between such cities as New York and Pittsburgh: *Pearce v. Langfit* (1882), 101 Pa. 507. Notice will be taken of the usual duration of voyages across the Atlantic; so far, at least, as to determine when the presumption of death attaches to one who was known to have embarked on a vessel that has never been heard of after a great lapse of time: *Oppenheim v. Wolf* (1846), 3 Sandf. Ch. (N. Y.) 571. Judicial notice will not be taken of the locality of the office of a justice of the peace; nor that a particular number of a certain street is in a given ward or district of a city: *Allen v. Scharrnighausen* (1880), 8 Mo. App. 229. Nor that certain land is not subject to location, because it lies under a navigable lake: *Wilcox v. Jackson* (1883), 109 Ill. 261.

XXXVI.

Facts of history must be well authenticated or universally known, to receive judicial notice. The Supreme Court of

Tennessee refused to take notice of the extent of military occupation of the State by the forces of either side, during the civil war, relating to the time when such occupation was still being contested; on the ground that those matters were of too uncertain character to be regarded as having passed into history; and as still being readily susceptible of proof: *McDonald v. Kirby* (1871), 3 Heisk. (Tenn.) 607. The same court refused to take cognizance of the positions of the armies in the field, at any particular period of the war: *Kelley v. Story* (1871), 6 Id. 202.

The Supreme Court of Texas, in a decision which seems to have been much misunderstood by writers on this subject, held, that the trial court, on the 16th day of April, 1861, could not take judicial notice, from the newspaper reports of the firing on Fort Sumter, on the 12th of the same month, that civil war existed, in the absence of any official declaration to that effect, by either the United States or Confederate authorities: *Bishop v. Jones* (1866), 28 Tex. 294.

The courts in New York hold that judicial notice will be taken of matters of general history or universal notoriety, if they are of a general and public nature, but not where they merely concern individuals or local communities: *McKinnon v. Bliss* (1860), 21 N. Y. 206. Facts stated in encyclopedias, dictionaries, or other publications, will not be judicially noticed, unless they are of such universal notoriety as to be regarded as forming a portion of the common knowledge of every person: *Kaolatype Engraving Co. v. Hoke* (U. S. C. Ct. E. D. Mo., 1887), 30 Fed. Repr. 444. Courts cannot take judicial notice of geographical and similar facts, not historical or traditional, as the capacity of a small stream for navigable or other purposes: *Buffalo Pipe Line Co. v. New York, Lake Erie, &c., R. R. Co.* (1880), 10 Abb. New Cas. (N. Y.), 107. Nor of the extent of the depreciation of the currency, during the war period: *Modawell v. Holmes* (1867), 40 Ala. 391. Nor, that during certain seasons of the year, Texas cattle are liable to produce disease: *Bradford v. Floyd* (1883), 80 Mo. 207. At the present time, the germ of the Texas cattle fever has been discovered, and identified, by Billings and others, and the fact that those cattle do communicate disease is established; and

it would seem now to be only a question of sufficient notoriety for courts to recognize such facts in regard to it.

Courts do not take notice of the market value of lead ore : *Cook v. Decker* (1876), 63 Mo. 328. Nor of the usages and customs of mining districts : *Sullivan v. Hense* (1874), 2 Colo. 424. Nor that concentric circles or layers in the trunk of a tree, each mark a year's growth : *Patterson v. McCausland* (1830), 3 Bland (Md.) 69. Nor that kerosene oil is a refined coal oil, or a refined earth oil : *Bennett v. North British Ins. Co.* (1879), 8 Daly (N. Y.) 471.

XXXVII.

In a criminal cause, where the person who was prosecuting attorney, when the indictment was found, has come upon the bench when the case was tried, the court does not judicially know that the prosecuting attorney and presiding judge is the same person : *Shropshire v. State* (1851), 12 Ark. 190. In Texas, notice will not be taken of any officer, unless enumerated in the code : *Alford v. State* (1880), 8 Tex. Ct. App. 545. Courts will not take judicial notice of the official character of a deputy marshal : *Ward v. Henry* (1865), 19 Wis. 76; *Fotter v. Luther* (1808), 3 Johns. (N. Y.) 431. Where constables are appointed by the town authorities, their official character will not be presumed by the courts : *Broughton v. Blackman* (1797), 1 D. Chip. (Vt.) 109.

The jury cannot take judicial notice of the facts of history, but some proof thereof must be given ; therefore, on an appeal from a non-suit, the appellate court cannot take notice of historical facts not put in evidence before the jury : *McKinnon v. Bliss* (1869), 21 N. Y. 206. In an action against an insurance company to recover for a loss by fire, the court cannot take judicial notice that gin and turpentine are inflammable liquids, within the meaning of that term as used in a clause providing that the policy shall be void, etc. : *Moseley v. Vermont Mutual Fire Ins. Co.* (1882), 55 Vt. 142. The court cannot judicially know whether or not there are legitimate modes of expending money in procuring the passage of an act of the legislature ; and, therefore, it cannot say that an averment, in an answer, of such expenditure with such purpose

and result, is either immaterial or vicious: *Judah v. Trustees, &c.* (1861), 16 Ind. 56. Where two corporations each commence proceedings against the same person in the same court, for the condemnation of the same lands, the court cannot, of its own motion, in one action, take judicial notice of the pendency of the other, and refuse to take any action in the matter, on the ground of the pendency of the other action: *Lake Merced Water Co. v. Cowles* (1866), 31 Cal. 215. Neither the Supreme, nor the District Court, of a State, will take judicial notice of proceedings pending in the Federal courts for confirmation of a Pueblo title, unless it is stated in the pleadings: *Vassault v. Seitz* (1866), Id. 225. In the trial of a case, the court cannot take cognizance of the record of another case in the same court, unless it is introduced in evidence; much less can it take such notice of a case in a different court: *People v. De La Guerra* (1864), 24 Cal. 73. A court cannot take judicial notice that an affidavit of a party had been admitted in another cause, to which he was not a party; nor can it be admitted in evidence upon the ground that the court remembers that it was in that case stated by the court that it would be evidence in the case at bar: *Baker v. Mygatt* (1862), 14 Iowa 131. Nor can a judge sitting in one county take notice of a conviction or *nol. pros.*, previously had before him in another county: *State v. Edwards* (1854), 19 Mo. 674. And an appellate court cannot become cognizant of the value of an attorney's services in a cause, by looking at his argument, as shown in the printed reports: *Pearson v. Darrington* (1858), 32 Ala. 227. An act which requires the courts of the county in which the articles of association are recorded, to take judicial notice of the existence of corporations thus formed, does not require the Supreme Court to take such notice: *Cicero, &c., Co. v. Craighead* (1867), 28 Ind. 274. And the value of the notes of a certain bank, at any particular time, will not be judicially noticed: *Feemster v. Ringo* (1827), 5 T. B. Mon. (Ky.) 336. Nor can the Supreme Court take judicial notice of the rules of the District Courts, unless they are incorporated in the record: *Cutter v. Caruthers* (1874), 48 Cal. 178. In the absence of evidence to that effect, the Supreme Court cannot take notice that a case before the Court is connected

with one previously decided by it: *Banks v. Burnam* (1875), 61 Mo. 76.

Courts will not take notice of military orders extending the time for a stay of execution on judgments: *Johnson v. Wilson* (1877), 29 Grat. (Va.) 379. A State court is not required to notice judicially, that proceedings in bankruptcy have been instituted by or against parties to a suit pending therein: *Esterbrook Mfg Co. v. Ahern* (1879), 30 N. J. Eq. 341. Nor can the courts in Minnesota take notice of the proper orthography or pronunciation of the Polish language: *State v. Johnson* (1879), 26 Minn. 316. Nor that a bank in another State is in an insolvent condition: *Market Bank v. Pacific Bank* (1882), 27 Hun (N. Y.) 465. The court cannot take official cognizance that an election has been held, as provided by a local option law, or of its result: *Grider v. Talley* (1884), 77 Ala. 422. And where, in an action for slander, the defence was, that the crime charged was a physical impossibility, the court could not take judicial knowledge of this fact for the want of sufficient information in regard to it, but held, that, if it were so impossible, this fact was not generally known to the people, who, though bound to know the law, are not required to be acquainted with philosophic or scientific facts and principles; therefore, the injury to the plaintiff might not be affected by the truth or falsity of those facts and principles, and that the action might well lie: *Ausman v. Neal* (1858), 10 Ind. 355.

While it is evident that a due administration of justice will not be enhanced by an enlargement of the grounds upon which courts take judicial notice of facts, it is equally clear that our system of jurisprudence must not be allowed to fall behind the rapid advancement of general knowledge. Through discoveries, and the application of new methods to the forces of nature, many results are constantly being developed, which, in some instances, produce complete changes in commercial, scientific, and even social affairs. It becomes, then, a question for the courts to determine, when such matters have attained sufficient notoriety, by becoming incorporated into daily life, to entitle them to judicial notice.

E. W. METCALFE.

Lincoln, Neb.

RECENT AMERICAN DECISIONS.

Court of Appeals of New York.

TALLINGER v. MANDEVILLE ET AL.

An agreement between husband and wife for a separation cannot be assailed, because the contracting parties were husband and wife, in action between the surviving wife and the executors of her deceased husband.

An executed agreement for a separation will not be interfered with, to relieve either party on the ground of public policy, as this is best subserved by leaving the parties where they have placed themselves.

Where a husband induced his wife to surrender an agreement of separation for a sum of money in hand, the wife cannot afterwards sue for the benefits of the surrendered agreement, without first returning the money received, when the defence made by the husband's executors is a denial of their testator's liability on the agreement surrendered.

Appeal from Supreme Court, general term, fifth department.

Action by Mary A. Tallinger against Austin Mandeville *et al.*, executors, etc., of Godfrey Tallinger, deceased, to recover on a contract to pay the sum of \$10,000. The plaintiff was non-suited at the Monroe Circuit Court, and appealed to the general term, where the judgment was affirmed, and appeal was then taken to the Court of Appeals.

P. Chamberlain, Jr., for appellant.

W. A. Sutherland, for respondents.

EARL, J., (April 16, 1889). On the 26th day of September, 1881, the plaintiff was married to the defendants' testator, Godfrey Tallinger, and they commenced to live together as husband and wife. On the 18th of February thereafter the testator executed the following instrument:—

"WHEREAS, I, Godfrey Tallinger, did on the 26th day of September, 1881, marry my present wife, Mary Tallinger, and did then, in consideration of said marriage, agree to secure to her the payment of ten thousand dollars upon my death, provided she should live with me, as my wife, until said time, and should, in all things, at all times, perform faithfully the duties of a wife, and take such care of me and my household as I should request, and as should be proper and reasonable. Now, therefore, I do, in consideration of the premises, agree with said Mary that ten thousand dollars shall be paid to her at my death, provided she shall faithfully perform all of said conditions on her part, and such performance, in full, shall be a condition precedent to any liability to her upon this agreement."

Both parties, at the same time, executed, under seal, another instrument, which was pinned to the former, as follows:

"It is agreed between Godfrey Tallinger and Mary Tallinger that the annexed instrument shall, upon its delivery, be deposited with Satterlee and Yeomans, or such other person, or persons, as said parties may agree upon, at any time, to be held by them until the death of said Godfrey Tallinger, as the said Godfrey desires that it should not be made a public matter, and that the observance of this agreement upon the part of said Mary Tallinger shall be a condition precedent to any liability upon said agreement."

The domestic life of Mr. and Mrs. Tallinger soon became unhappy and inharmonious; and an agreement was made for a separation, in pursuance of which, on the 20th day of July, 1882, they executed, under seal, the following instrument:—

"This agreement, made this 20th day of July, 1882, between Godfrey Tallinger, of Rochester, N. Y., and Mary Tallinger, of the same place, witnesseth, that, in consideration of five thousand dollars, this day paid by said Godfrey to said Mary, and other valuable considerations, it is agreed that said Mary shall absent herself continuously from, and not visit, the house of said Godfrey, or communicate with him, or molest him, or make any claim upon or against him, in any manner, or against his estate after his death; and will, upon request of any person interested in the same, after his death, execute to and deliver to them, release of dower or other claim or interest in the estate of said Godfrey, and the said Mary does hereby release all claim of dower, or other interest, in any property now owned by said Godfrey, or which he may hereafter own; and if said Mary shall violate any of the conditions or provisions hereof, or shall fail to perform any of the same, she shall thereupon repay to said Godfrey, his assigns or personal representatives, said \$5,000.00 and the interest thereon from this date, as liquidated damages, and she charges her separate estate therewith; and a certain agreement heretofore executed by said Godfrey and said Mary, whereby he agreed to pay at his death, upon the performance of certain conditions therein expressed, the sum of \$10,000.00, is hereby canceled and abrogated."

Thereafter they lived separate, and Mr. Tallinger died on the fifth day of December, 1884. The plaintiff claimed dower in the real estate left by her husband, and it was admeasured to her, and in October, 1886, she commenced this action to recover the \$10,000 mentioned in the instrument executed February 18, 1882. In her complaint she alleged an oral agreement to pay the \$10,000 in consideration of her marriage to the testator, and the subsequent execution of the written agreement, and that the \$10,000 became due and payable, and demanded judgment for that sum, with interest from the death of the testator. The defendants, in their answer, alleged,

among other things, that the plaintiff did not, after the execution of the written instrument, live with the testator as his wife, caring for his household, and performing all the duties of a wife faithfully; but that, on the contrary, she grossly and willfully failed and neglected to perform her duties in the care and management of his household, and to sustain the dutiful relations of a wife; and they set up, as a further defense, the execution of the instrument of July 20, 1882, and demanded judgment for \$5,000, as therein specified, for liquidated damages. The plaintiff served a reply, simply denying the allegations of the counter-claim. Upon the trial, the plaintiff gave some evidence tending to show misconduct on the part of her husband, and that she had just cause for separation from him. The defendants then proved the instrument dated July 20, 1882, and gave no further evidence. Upon defendants' motion the court then nonsuited the plaintiff. The judgment entered upon the nonsuit was, upon appeal to the general term, affirmed.

On the 20th day of July, 1882, the plaintiff held the obligation of the testator to pay her \$10,000 at his death upon the conditions mentioned. That obligation constituted her separate estate, and, under the laws of this State, she had the same right to deal with it as if she were a *feme sole*. She could sell, release or discharge it at her pleasure. It was payable upon certain conditions, which might not be performed by her; and the estate of her husband might not at his death be sufficient to meet it. Hence, clearly, the instrument, payable at an uncertain time in the future upon the contingencies mentioned, was not of the value of \$10,000. It is claimed, however, on the part of the plaintiff, that, as she was the wife of the testator, her agreement made with him on the 20th day of July, 1882, did not bind her. It is undoubtedly true that, so far as that agreement remained executory, it could not have been enforced by Mr. Tallinger, or his executors. But it was executed. She received in cash \$5,000, and was released from the conditions contained in the prior instrument, binding her to live with him, and faithfully to perform the duties of wife, and to take care of him and his household during his life. For the surrender, therefore, of the prior obligation, she re-

ceived ample consideration. There is no allegation in the complaint or reply, and there was no proof upon the trial, that the consideration of \$5,000 paid to her in hand, was not an adequate consideration for the surrender of the prior conditional obligation of her husband. There has never been a time in the history of the law, and certainly not since 1848, when such an agreement between husband and wife relating to her separate estate, and fully executed, would have been absolutely void. She surrendered an obligation which she then held as a part of her separate estate, and in lieu thereof received \$5,000 in money, and that became her separate estate; and it never could be held in a forum administering both law and equity that she could hold the money thus received, and enforce the obligation which she had surrendered in consideration thereof.

Agreements between husband and wife, founded upon valuable considerations, have frequently been enforced in equity. She may even sell her separate estate to her husband for a valuable consideration, and the sale will be upheld in equity: *White v. Wager* (1862), 25 N. Y. 328; *Winans v. Peebles* (1865), 32 Id. 423; *Hunt v. Johnson* (1870), 44 Id. 27; *Boyd v. De La Montagnie* (1878), 73 Id. 498. Here, by her own act, she surrendered, released, and discharged her husband's obligation. Thereafter, she did not in any sense hold or possess it, and she could regain it, and be reinstated in her rights under it, only by a suit instituted in equity for that purpose, in which case relief could be granted to her according to the equities of the case, as they appeared upon the proofs. The agreement of the 20th of July, 1882, cannot, therefore, be assailed in this action, because the parties thereto were husband and wife.

The further objection is made, on behalf of the plaintiff, that the agreement of July 20th was illegal, and against public policy, as it provided for the separation of husband and wife. If it were an executory agreement, and either party was seeking to enforce it, the objection would be a good one. But here the agreement had been executed. She took the \$5,000 and gave up her obligation. The law will never interfere, at the instance of either party, with what has been done in exe-

cution of an illegal agreement. It simply refuses to enforce such agreements, or such as are against public policy; but it never intervenes to relieve either party against them, so far as they have been executed. It refuses to enforce such agreements, not from any regard or concern for the parties thereto, but to promote the public policy and the general welfare; and, so far as they have been executed, they cease to interest the public, and public policy is supposed to be best subserved by letting them alone, and leaving the parties to them where they have placed themselves. The obligation upon which she sues has been paid and discharged, and it does not avail her to say that such payment and discharge were in pursuance of an agreement which was in fact illegal. It has nevertheless been paid and discharged, and the law will not, at her instance, either directly or indirectly, set aside or undo what has been done, on account of any illegality in the agreement.

It is also claimed by the plaintiff, that from the relation existing between Mr. and Mrs. Tallinger, it must be presumed that she was overreached, imposed upon, or defrauded by her husband; but all the facts appear here, and there is nothing from which such a presumption can arise. At the time of the execution of the obligation of February 18, 1881, Mr. Tallinger was about 72 years old, and it was impossible on the 20th of July thereafter to estimate precisely the value of that obligation. It was conditioned upon performance of several things by the plaintiff. Its value depended, to a large extent, upon the length of the testator's life, and of the adequacy of his property at death. Under such circumstances, it is not apparent that \$5,000 in hand paid, was not a fair equivalent for the release of the obligation. There is no allegation in the complaint, that she was overreached or defrauded, or that the amount paid her was not adequate. But, even if the plaintiff had been overreached by being induced to surrender the prior obligation, and to take in lieu thereof \$5,000 in money, she was in no condition to succeed in this action. The defendants did not admit the liability of the testator upon the obligation of February 18th, but disputed it, and alleged that she had violated the conditions mentioned therein, and that she was not, therefore, entitled to recover anything. Under

such circumstances, before she could recover upon the original instrument, she should have repudiated the subsequent agreement of July 20th, and should have tendered back the \$5,000. It is not a case where, upon the undisputed facts, the plaintiff would be entitled to recover something, either under the original obligation or the substituted agreement. The executors denied their obligation to pay anything, and in such a case it was the duty of the plaintiff to restore the \$5,000, that the litigation could thereafter be carried on solely upon the liability of the defendants under the original agreement: *Gould v. Bank* (1881), 86 N. Y. 75.

The judgment should therefore be affirmed, with costs.

All concur.

An agreement for separation, made by a husband and a wife while they are living together, and to take place presently, has, in some instances, been held to be valid, but where it is made to take place in the future, it is such as the court will not uphold, because contrary to public policy.

["Contracts of this description have been long sanctioned in England, owing, probably, to the circumstances that absolute divorces are not permitted for causes arising subsequent to the marriage. But, in this State, such liberal provision is made by law, for divorces, that necessity does not require, and policy does not admit, a separation by private agreement:" SWIFT, J., dissenting, *Nichols v. Palmer* (1811), 5 Day (Conn.) 58. Still, it was soon said that, "although the wisest judges have frequently asserted that deeds of separation are at variance with the policy of law, it is now too firmly settled to be shaken:" ROGERS, J., *Hutton v. Duey* (1846), 3 Pa. 101, 104.

Recognized in U. S. as valid.

[The Supreme Court of California, in 1858, felt justified in saying that, "by the settled law of the United States

such agreements are not invalid because against sound principles of policy, and are upheld and enforced when entered into through the intervention of a trustee, if followed by immediate separation, or if separation has previously taken place:" FIELD, J., *Wells v. Stout*, 9 Cal. 479, 494.

[Such is still the law: *Walker v. Walker* (1869), 76 U. S. (9 Wall.) 743.

[California Civil Code (chap. 3, ed. 1885, p. 44.) provides—"§ 159. A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them, and of their children, during such separation." Separation, under this section, ends the immediate family relationship: *In re Noah*, S. Ct. Cal., Oct. 24, 1887.

Nichols v. Palmer (1811), 5 Day (Conn.) 47; *Goodwin v. Goodwin* (1810), 4 Id. 345, 351, 353, 354.

Chapman v. Gray (1850), 8 Ga. 341; *McLaren v. Bradford* (1874), 52 Id. 648.

Phillips v. Meyers (1876), 82 Ill. 67.

Reed v. Beasley (1820), 1 Blackford

(Ind.) 97; *Dutton v. Dutton* (1868), 30 Ind. 452.

Read v. Howe (1862), 13 Iowa 50; *McKee v. Reynolds* (1869) 26 Id. 578; following the doctrine of *Hutton v. Ducey* (1846), 3 Pa. 100; *Blake v. Blake* (1858), 7 Iowa 46; *Robertson v. Robertson* (1868), 25 Id. 350; *Linton v. Crosby* (1880), 54 Id. 478, 481; *Goddard v. Beebe* (1853), 4 Greene (Iowa) 126, following *Read v. Beasley* (1820), 1 Blackford (Ind.) 97.

Gaines v. Poor (1861), 3 Met. (Ky.) 503; *Loud v. Loud* (1868), 4 Bush (Id.) 457; *Simpson v. Simpson* (1836), 4 Dana (Id.) 140.

Kremelberg v. Kremelberg (1879) 52 Md. 553, 563; *Lippy v. Masonheimer* (1856), 9 Id. 310; *McCubbin v. Patterson* (1860), 16 Id. 179; *Schindel v. Schindel* (1858), 12 Id. 294; *Helms v. Franciscus* (1828), 2 Bland Chan. (Md.) 544, 565; *Brown v. Brown* (1847), 5 Gill (Id.) 249, 254 (explained in *J. G. v. H. G.* (1870), 33 Md. 408); *Wallingsford v. Wallingsford* (1825), 6 H. & J. (Id.) 485, 489.

Fox v. Davis (1873), 113 Mass. 255; *Page v. Trufant* (1806), 2 Id. 159; *Albee v. Wyman* (1857), 76 Id. 222; *Chapin v. Chapin* (1883), 135 Id. 393; *Alley v. Winn* (1883), 134 Id. 77.

Randall v. Randall (1877), 37 Mich. 563.

Stephenson v. Osborne (1866), 41 Miss. 119; *Garland v. Garland* (1874), 50 Id. 694, 716; *House v. Harden* (1875), 52 Id. 860, 874.

Garbut v. Bowling (1883), 81 Mo. 214.

Sales v. Sales (1850), 21 N. H. 312.

Dixon v. Dixon (1873), 23 N. J. Eq. 316.

[*Carson v. Murray* (1832), 3 Paige's Chan. (N. Y.) 483; *Pettit v. Pettit* (1887), 107 N. Y. 677; *Cropsey v. McKinney* (1859), 30 Barb. (N. Y.) 47; *Calkins v. Long* (1855), 22 Id. 103; *Clark v. Foodick* (1886), 13 Daly (N.

Y.) 500; *Beach v. Beach* (1842), 2 Hill (Id.) 260; *Anderson v. Anderson* (1832), 1 Edw. Chan. (N. Y.) 380; *Wright v. Miller* (1843), 1 Sandf. Chan. (Id.) 103; *Morgan v. Potter* (1879), 17 Hun. (Id.) 403; *Mercein v. People* (1840), 25 Wend. (Id.) 64, 97; *Shelthar v. Gregory* (1829), 2 Id. 422; *Griffin v. Banks* (1868), 37 N. Y. 621; *Dupre v. Rein* (1878), 56 How. Pr. (N. Y.) 228; *Mann v. Hulbert* (1885), 38 Hun (Id.) 27; *Allen v. Affleck* (1882), 64 How. Pr. (Id.) 380.

[*Garver v. Miller* (1866), 16 Ohio St. 527; *Thomas v. Brown* (1859), 10 Id. 247; *Bettle v. Wilson* (1846), 14 Ohio 257.

Hutton v. Ducey (1846), 3 Pa. 100; *Dillinger's App.* (1860), 35 Id. 357; *Hintner's App.* (1867), 54 Id. 110; *Agnew's App.*, S. Ct. Pa., Jan'y 23, 1888; *Smith v. Knowles* (1853), 2 Grant (Pa.) 413; *Walsh v. Kelly* (1859), 34 Pa. 84.

[North Carolina denies the validity of contracts for separation: *Collins v. Collins* (1867), 1 Phillips Eq. 155.

["It is to be considered for the first time, whether a deed of separation between husband and wife will be enforced in this court. * * * It is to be admitted that in some of the old governments, passions and vices have fixed this evil upon society. It was unknown to the common law. * * * If there were any doubt as to our policy, it would seem to be clearly settled by our legislation. Important as the relation is, our whole legislation is comprised in a few pages of the Revised Code. It provides that marriage shall be indissoluble, except for impotency at the time of marriage, or subsequent infidelity. It allows separation only when the wife's condition is intolerable, or life burdensome. And it allows separate support only where the husband is a drunkard or a spendthrift, and is wasting his substance to the impoverishment of his family. And in all these cases

the parties are not allowed to be the judges; but they must make application to court, and, so far from their consent availing anything, there must be satisfactory proof that there has been no collusion or concert; and if for divorce, that it is not for the mere purpose of being *fried and separated* from each other—observe, *separated* from each other:” READE, J., *Id.* 158. This doctrine has been strongly approved, as what ought to be the pronounced American doctrine, by Schouler, *Dom. Rel.*, § 217.

[The Supreme Court of that State has, however, lately said—“It may admit of question, in view of subsequent changes in the law of marriage, in respect to the property rights of the woman, whether the proposition”—that deeds of separation are against law and public policy, and will not be enforced, (*Collins v. Collins, supra*)—“in its unlimited extent, can now be upheld. A voluntary separation, under some circumstances, is recognized as a legal condition, out of which may arise certain powers to be exercised over her estate:” SMITH, C. J. *Sparks v. Sparks* (1886), 94 N. C. 527, 531. The learned judge after quoting the Code (§1831)—“Every woman, who shall be living separate from her husband, either under a judgment of divorce, by a competent Court, or under a deed of separation, executed by said husband and wife, and registered in the county in which she resides,” shall have the effect of making her a free trader, added—“This act of legislation, passed in February, 1872, in furtherance of the constitutional provision, by which the property of the woman, on her marriage, is secured to her as separate estate, implies a possible legal separation of the parties, by voluntary agreements, and defines her condition and rights resulting therefrom. If such a case can exist, and be upheld by law, the

facts of that before us, would be one:” *Id.* 532. *Collins v. Collins* was not explicitly overruled, however: “The decision in the case referred to, is in general terms, that such contracts, merely as such, have no binding obligation which will be enforced, because public policy favors the preservation of the nuptial tie, and is opposed to any arrangement between the parties, by which its resultant duties are evaded. But the principle is, that such an agreement will not be enforced, at the instance of either party; not that what may have been done in carrying out its purpose will be undone by the Court. It will not assist, when its aid is asked, or, in the words of the Court, its provisions ‘will not be enforced in this Court’—a Court exercising equitable functions: *Id.* 532. So the wife was refused relief from a conveyance made by her, in pursuance of the marriage settlement.

[*Buckner v. Ruth* (1861), 13 Rich. (S. C.) 157.

Goodrich v. Bryant (1858), 5 Sneed (Tenn.) 325; *Keys v. Keys* (1872), 11 Heisk. (Id.) 425; *McAllister v. McAllister* (1872), 10 Id. 345. *Parham v. Parham* (1845), 6 Hump. (Id.) 296 is to the contrary and has no supporting authority: WILLIAMS, C. J. *Loud v. Loud* (1868), 4 Bush. (Ky.) 459–60.

Walker v. Stringfellow (1868), 30 Texas 570.

Squires v. Squires (1880), 53 Vt. 211.

[*Switzer v. Switzer* (1875), 26 Gratt. (Va.) 574; *Harsberger v. Alger* (1878), 31 Id. 52; though these cases do not fairly decide the question, the the court merely admitting the weight of authority to be in favor of the validity of deeds of separation: 31 Id. 61.

A common law doctrine.

[“The doctrine of separate maintenance, by aid of a trustee, is found in the earliest records of *English* jurisprudence. Such contracts have, for ages,

been protected and enforced in their courts of chancery: and when collaterally brought to view in courts of law, have been recognized as the basis of legal adjudications. So far have the courts in *England*, from questioning the efficacy of such agreements to support a contract for maintenance, that a very different question has agitated them in modern times, *vis.*, the capacity of the wife during such separation: BALDWIN, J., *Nichols v. Palmer* (1811), 5 Day (Conn.) 51.

[The general principle was declared by Chancellor WALWORTH to be that "it is impossible for a *feme covert* to make any valid agreement with her husband, to live separate from him, in violation of the marriage contract, and of the duties which she owes to society, except under the sanction of the court; and in a case where the conduct of her husband has been such as to entitle her to a decree for a separation. The law of the land does not authorize, or sanction, a voluntary agreement for separation between husband and wife. It merely tolerates such agreements, when made in such a manner that they can be enforced by, or against, a third person, acting in behalf of the wife:" *Rogers v. Rogers* (1834), 4 Paige Chan. (N. Y.) 516, 517; and, again, that "it may well be doubted, whether public policy does not forbid any agreement for a separation between husband and wife, except under the sanction of a court of justice; and whether it does not also require that such agreements should be limited to those cases where, by previous misconduct of one of the parties, the other is entitled to have the marriage contract dissolved, either wholly or partially, by a decree of the competent tribunal:" *Carson v. Murray* (1832), 3 Paige Chan. (N. Y.) 483, 500.

[From another point of view, it was said that equity would never decree a

separation, "even when husband and wife have stipulated for it in the most formal and solemn instruments, whether they be executory, as articles of agreement, or complete, as by deed: *Worral v. Jacob* (1817), 3 Mer. 268; *Legard v. Johnson* (1797), 3 Vesey Jr. 352; *Head v. Head* (1747), 3 Atkyns 550; *McKenna v. Phillips* (1828), 6 Whar. (Pa.) 576. When the parties have effected the separation, equity will control its incidents and accomplish its lawful objects; it will compel the husband to pay what he stipulated to pay for the maintenance of the wife, and the trustee to perform his duties faithfully, but it will not decree a separation. It is impossible that equity should engage in the work of putting asunder those whom God has joined together. In England this is said to be from deference to the ecclesiastical courts, who tolerate no voluntary separation of husband and wife; but the true ground of the rule is to be found, I apprehend, in the sacredness of the marriage bond, and the marital rights of the husband at common law:" WOODWARD, J., *Smith v. Knowles* (1853), 2 Grant (Pa.) 415.]

Separation essential.

A contract for separation, to be effectual, must be entered into at a time when the husband and wife are living separate, or must be followed by a separation in pursuance of such agreement: *Carson v. Murray* (1832), 3 Paige Chan. (N. Y.) 483, 501; *Magee v. Magee* (1874), 67 Barb. (N. Y.) 487, 490. ["The great weight of authority sustains the validity of such contracts where the separation has taken place, or is to take place immediately. But where the agreement is made in contemplation of future separation, the current of authority is against its validity. In this case, the bill" filed by the trustee "recites that the parties have lived separately since the agreement:"

ENDICOTT J., *Fox v. Davis* (1873), 113 Mass. 257.

Where the parties are living together, an agreement for the future separation of husband and wife, is void, although entered into through the intervention of a trustee: *Mercein v. The People* (1840), 25 Wend. (N. Y.), 64, 77; *Carson v. Murray* and *Rogers v. Rogers*, *supra*.

[It seems that this is a consequence of the principle that cohabitation rescinds a contract of separation: per BRADY, J., *Gould v. Gould* (1865), 29 How. (N. Y.) Pr. 441, 458.

Consideration.

Where the separation already exists and is not produced by the agreement, the contract is valid, and the consideration of the husband's agreement to pay the sum of money to his wife, as agreed in the contract, is his release from liability for the support of his wife: FINCH, J., *Pettit v. Pettit* (1887), 107 N. Y. 679, citing *Calkins v. Long* (1855), 22 Barb. 97; *Mann v. Hulbert* (1885), 38 Hun 27; and *Carpenter v. Osborn* (1886), 102 N. Y. 552.

[An actual consideration is of importance, for READ, J., remarked, in affirming a judgment for dower, in spite of an agreement without any real consideration, "she got nothing from him except the child which she raised:" *Walsh v. Kelly* (1859), 34 Pa. 85.

[The question of a consideration is important when there are creditors of the husband: *Griffin v. Banks* (1868), 37 N. Y. 621. In such case, the mere release by the husband, of his property to his wife, without a covenant by a competent third party as trustee, that the husband shall not be chargeable with the wife's maintenance, will be without consideration and void at law, and, as to subsequent creditors of the husband, void in equity also: *Cropsey v. McKinney* (1859), 30 Barb. (N. Y.) 47; *Beach v. Beach* (1842), 2 Hill

(Id.) 260. In this respect, agreements for separation are not different from other post-nuptial agreements between husband and wife.

[If the consideration of the deed is really the obtaining a divorce, and the deed is not designed to secure to the wife, either her property, or maintenance, the deed will transgress the provisions of the divorce statutes, forbidding collusion. The length of this note forbids more than a reference to *Speck v. Dausman* (1879), 7 Mo. App. 165; *Schmieding v. Doellner* (1881), 10 Id. 373; *Phillips v. Thorp* (1882), 10 Ore. 494; *Cross v. Cross* (1878), 58 N. H. 373; *Kilburn v. Field* (1875), 78 Pa. 194.

[While payment of the consideration cannot be compelled by the court, in case of agreements without a trustee, actual payment will be recognized, and the party paid will be held estopped to make any claim against the provisions of the deed, except upon the ground of fraud, deception, or oppression: *McKee v. Reynolds* (1869), 26 Iowa 589; *Robertson v. Robertson* (1868), 25 Id. 350.

[The inducing cause of the separation is immaterial: *Gould v. Gould* (1865), 29 How. (N. Y.), Pr. 441, 458; *Carson v. Murray* and *Rogers v. Rogers*, *supra*.

[See also under *Effect of a subsequent divorce*, *infra*.

Effect of reunion.

[Recision of the contract will be presumed, if the parties afterwards cohabit, as husband and wife, by mutual consent, for ever so short a time: WALWORTH, Chan., *Carson v. Murray* (1832), 3 Paige Chan. (N. Y.), 483, 501; *Shelthar v. Gregory* (1829), 2 Wend. (N. Y.) 422.

[But where the cohabitation was for a single night only, and inferably, from lack of opposing evidence, that this was with the wife's consent, the Court held

the contract to continue in force. It contained an express covenant that the husband should not visit his wife, without her consent. Contention was made that this solitary visit amounted to a reconciliation and abrogated the deed. "The conduct of the parties shows clearly there was no reconciliation, and no determination, or wish, or desire, to live together again as man and wife. The wife acted under the deed of separation, and has always received the income of the real estate, and all the personal estate, up to the present time. The theory of reconciliation, waiver, or abandonment, would have invalidated this deed, but she has never evinced any wish, or intention, to act upon this view of the question. So, after seeing her husband but three or four times in two years, she never sees him again at all, during the year he died. She believed the separation was complete and the deed inviolate, and it is clear the testator so thought and acted. The acts of both parties showed that they both believed they were as completely separated as two persons could be, who were still in strict law, man and wife:" READ, J., *Hitner's App.* (1867), 54 Pa. 110, 116.

[A stipulation in the articles of separation, that the parties might visit each other, by mutual consent, in times of sickness, will not vitiate the agreement, until acted upon by actual cohabitation; in the latter case, even a stipulation that the deed should not thereby be annulled will not be effective to keep the separation valid: WALWORTH, Chan., *Carson v. Murray* (1832), 3 Paige Chan. (N. Y.), 483, 502; 2 Story, Eq. Jurisp., § 1428; *Chapman v. Gray* (1850), 8 Ga. 349, per LUMPKIN, J.

[But this avoidance of the deed of separation, is not to be understood to apply to a separate maintenance, stipulated to continue if the parties should come together again: *Walker v. Wal-*

ker (1869), 76 U. S. (9 Wall.), 743, 752. "It was the intention of the parties that the arrangement should be permanent, and to accomplish that purpose, the agreement was framed so that the wife should enjoy her separate estate during life, although she should subsequently become reconciled to her husband, and cohabit with him. We can see no valid objection to such a provision, and it is certainly supported by authority (*Wilson v. Muskett* (1832), 3 Barn. & Ad. 743; Bell, Husb. and Wf., 525-41). The husband had a right to make a settlement upon his wife, without any view of to separation, and the insertion of this provision shows that he did not intend the settlement to cease on the return of the wife to cohabitation:" DAVIS, J., *Id.*

Effect of a subsequent divorce.

["What is the effect of a divorce for the wife's adultery, which was known to the husband at the time of the execution of the deed, upon such a covenant? It cannot be unlawful for a husband to provide by deed for the support of an erring wife; and if he should subsequently obtain a divorce for adultery, of which he was aware at the time he made the covenant, and the wife has done nothing to forfeit her rights under the covenant, we see no good reason why the divorce should discharge the husband from the obligation he has thus voluntarily assumed. * * * * There is no proof, nor is there any intimation, that the wife has been guilty of a repetition of the offence which has been the source of all this trouble. And although the deed of separation does not operate as a bar to the application for divorce, we see no inconsistency in granting a divorce, and, at the same time, refuse to release the husband from a covenant providing for the support of his wife. * * * The fact is, at the time the covenant was made, the parties only con-

templated living apart, and did not therefore make any provision upon the contingency of a divorce:" ROBINSON, J., *Kremelberg v. Kremelberg* (1879), 52 Md. 553, 563, 564. Here, the Court point out that the case of *Charlesworth v. Holt* (1873), 29 L. T. R. (N. S.) 647; 22 W. R. 94; 43 L. J. Exch. 25; 9 L. R. Exch. 38, went much further, as the adultery there had occurred after the deed: the husband was held to his covenants, after obtaining a divorce on that ground. To the same effect: *Dixon v. Dixon* (1873), 23 N. J. Eq. 316; s.c. 24 Id. 133; *Lister v. Lister* (1882), 35 Id. 49, 57.

[The courts go further and sustain the covenants, even though the wife should remarry after a divorce, subsequent to their execution: *Blaker v. Cooper* (1822), 7 S. & R. (Pa.) 500. TILGHMAN, C. J., pointed out that the release of dower "was an important consideration. He retains all the benefit of this agreement, notwithstanding the subsequent divorce and marriage of his wife. It does not appear on the record, at whose instance this divorce was obtained, not what was the cause of it. It may be that it was caused by the husband's misconduct, and if so, it would be a bad reason for getting rid of the annuity. I will not presume that it was occasioned by the misconduct of the wife, because it is not shown. There is no doubt that a man may agree to pay an annuity to his wife during his life, whether she remains his wife, or obtains a divorce and marries again; and it appears to me that, in the present case, there has been such an agreement:" Id. p. 502. This was accepted as good law by the Court of Appeals of New York, in *Carpenter v. Osborn* (1886), 102 N. Y. 552, 560.

[Where the wife sued for maintenance and the husband agreed to pay a sum of money, if the wife would give a bond with surety, to release all claims

upon him and upon his estate, and this was done; the bond was held to be valid, as not against public policy, and the surety compelled to reimburse the husband for moneys which he had paid under the stress of an order of court, which was afterwards reversed: *Winn v. Sanford*, S. Ct. Jud. Ct. Mass., Nov. 28, 1888.]

A trustee is necessary.

[The trustee for the wife is an essential party to all contracts, unless there is some statutory exception: *Rogers v. Rogers* (1834), 4 Paige Chan. (N. Y.) 516. This will be apparent after reflection upon the common law principles, which identify the husband and wife. "It follows from these principles that the wife will have no separate interest in the property put into the hands of a trustee for her support, and that she can have no remedy, in a court of chancery, to call the trustee to account; but if the trustee is guilty of a breach of trust, he must be liable to the husband, for a violation of his contract, and to him, or his representatives, only. It will follow also, that the wife may return to her husband, whenever she chooses, and he will be as much obliged to afford her protection and support, as though no such agreement had been made, and her right of dower, in case she survives her husband, will remain altogether unimpaired:" SMITH, J., *Nichols v. Palmer* (1811), 5 Day (Conn.) 57.

[The great necessity for a trustee is seen to arise, *first*, from the principles that neither husband nor wife may release their marital rights of curtesy, or dower, except to a third person, and not then if designed to separate such inchoate estate from the title in fee: DILLON, C. J., *McKee v. Reynolds* (1869), 26 Iowa 582-9. And, *second*, from another principle, that actions between the husband and wife, for violations of the

agreement of separation, require a trustee to represent the wife: *Simpson v. Simpson* (1836), 4 Dana (Ky.) 140.

[Hence, where the trustee declined to act, the deed was held to be void: *Smith v. Knowles* (1853), 2 Grant (Pa.) 413.

Exceptions to necessity for a trustee.

[The necessity for a trustee was not recognized, where the deed was made directly between the parties, and its validity was not drawn into question until after the husband's death; the wife was then not allowed to violate the agreement and claim her dower or thirds, the Court saying—"At law, no contract can be made between husband and wife, without the intervention of trustees; for she is considered as being *sub postestate viri*, and incapable of contracting with him. But in equity, when the contract is reasonable, and when it has been consummated, it will be upheld:" *ROGERS, J., Hutton v. Duey* (1846), 3 Pa. 101, 105.

[This case is said to be not in harmony with the general current of authorities, and is at variance with the former rulings of this court, in the cases already cited: *ELLETT, J., Stephenson v. Osborne* (1866), 41 Miss. 126, citing *Carter v. Carter* (1850), 14 S. & M. (Miss.) 59 (which rests upon the authority of *Clancey, Hus. & Wf.* 392, and *Kent, Comm.* 176), and *Mills v. Richards* (1857), 34 Miss. 77 (where a deed was made directly between husband and wife).

[The law of *Hutton v. Duey* was afterwards affirmed in *Dillinger's Appeal* (1860), 35 Pa. 357, and is still good law, notwithstanding the criticism of *ELLETT, J., supra*.

["Usually such agreements are entered into by means of trustees, but equity, which is not strenuous of forms, does not necessarily require this for-

mality:" *DILLON, C. J., McKee v. Reynolds* (1869), 26 Iowa 588, citing *Bonslaugh v. Bonslaugh* (1828), 17 S. & R. (Pa.) 361. This cited case was an action of ejectment, in which the question of title depended upon a deed of separation made directly between husband and wife, and in which the husband relinquished all claim on real estate conveyed to his wife and the heirs of her body and their heirs, by his father-in-law. The parties had notoriously lived apart for some years, when a creditor of the husband seized the husband's interest and sold it at sheriff's sale. The sheriff's vendee failed to recover the land.

[On the other hand, the absence of a trustee, in cases where the wife is not enabled to convey her real estate without her husband, effectually prevents her alienation without the joinder of the husband in the deed: *Lippy v. Masonheimer* (1856), 9 Md. 310.

[Of course, there is in general no necessity for a trustee in States where the rights, powers and obligations of married women are greatly enlarged; especially where a married woman may convey her interest in real estate, in the same manner as other persons: *Robertson v. Robertson* (1868), 25 Iowa 350, 354, 355. (But see, *infra*.)

[In Iowa, the case cited was nullified by Section 2203 of the Code, (ed. 1888, p. 801)—"When property is owned by either husband or wife, the other has no interest therein which can be the subject of contract between them, or such interest as will make the same liable for the contracts or liabilities of either the husband or wife who is not the owner of the property, except as provided in this chapter." Hence, a deed of separation, in which the wife released her dower right, was held inoperative to prevent her from having her dower admeasured, after the husband's death: *Linton v. Crosby* (1880), 54 Iowa 478.

Trust by implication.

[There may be a trustee by the legal effect of the deed of separation.

Thus, in *Cook v. Cook* (1886), 13 Daly (N. Y.) 500, the Court of Common Pleas of New York City were asked to declare as void an agreement of separation between husband and wife, as principals, and two others as sureties. The husband covenanted with the wife and the sureties, to pay a yearly sum, and also covenanted with the sureties to perform his covenants. The sureties also covenanted to indemnify the husband against his wife's future obligations. The sureties were held to be trustees, and the agreement declared to be valid. To the same effect, *Dupre v. Rein* (1878), 56 How. (N. Y.) Prac. 228.

When set aside.

[In Ohio, a trustee was held to be unnecessary, if the Court were satisfied of the fairness of the provision for the wife. In that case, the widow claimed against the husband's estate; BRINKERHOFF, J., said: "That a parol post-nuptial agreement made between husband and wife, in view of a voluntary separation, and fully executed on the part of the husband, whereby, for a consideration, which, in the light of all the circumstances of the parties at the time the contract is made, is fair, reasonable and just, the wife relinquishes all claim to a distributive share of the husband's personal estate, in case she survive him, will be upheld and enforced in equity, and that the intervention of a trustee is unnecessary, are propositions now too firmly settled to require the citation of many authorities for their support. I therefore content myself with citing the cases of *Thomas v. Brown* (1859), 10 Ohio 247; *Houghton v. Houghton* (1860), 14 Ind 505; *Wilson v. Wilson* (1848), 1 H. L. Ca. 538, and *Dilling-er's App.* (1860), 35 Pa. 357. But, in respect to contracts of this, and of a kindred kind, equity is properly some-

what jealous of the influence which it is commonly in the power of the husband to exert in their procurement, however that influence may arise—whether from her lingering fondness and habitual deference, the restraint of his presence, his superior knowledge of business and values, or his powers of coercion and annoyance. Hence, it is an essential element of the proposition above stated, that the terms of the contract in favor of the wife, shall be fair, reasonable and just to her, in view of all the circumstances of the case and of the parties at the time the contract is made:" *Garver, Ex'r of Miller, v. Miller* (1866), 16 Ohio 527, 531.

[Hence, in Virginia, the Circuit Court set aside a deed of separation, because "it does not clearly appear that, in the negotiation which preceded the agreement, as well as at the time of executing the same, the wife was in a position in which she could act, and did act, not only with perfect freedom, but with knowledge and appreciation of all the circumstances of her situation and of her individual and marital rights; and that the contract in itself was fair and just, wholly free from exceptions, and such as a court of equity itself might have imposed upon the parties, in a case in which their persons and their property had properly fallen under its jurisdiction and control." And this was affirmed by the Court of Appeals: *Sautzer v. Sautzer* (1875), 26 Grat. (Va.) 574, 582.

[Where the wife seeks to have the deed set aside, on the grounds of fraud, duress, and inequality, and fails, the Court cannot do more than dismiss the bill; a decree, that the deed remain in full force and effect, requires a proper cross-bill: *Borckman's App.*, S. Ct. Penna., May 24, 1886.

Rescission.

[The wife may rescind the deed by voluntarily accepting other provisions;

she will not be allowed, at some other time, to revive the covenants of the deed: *Albee v. Wyman* (1857), 76 Mass. 222.

Parties to the Deed.

[The wife must sign the deed; she cannot act by attorney, even in an agreement filed of record in a suit for alimony and intended to amicably terminate such suit: *Wallingsford v. Wallingsford*

(1825), 6 H. & J. (Md.) 485. Here the agreement was at the foot of the husband's answer.

[In Vermont, the wife's father was permitted to sign the deed of separation, as the wife's agent. The separation had already occurred, and the father was treated as her trustee, and the deed held to be valid, as though she had signed it in fact: *Squires v. Squires* (1880), 53 Vt. 208. JAS. M. KERR.

Supreme Court of Wisconsin.

SOQUET v. THE STATE.

The testimony of a medical witness is, at best, hearsay, and inadmissible in a criminal trial for murder by poison, when the witness has had no practical experience in the treatment of cases of this character, and can testify only from memory, what medical works and instructors teach on the subject.

Boyle v. The State (1883), 57 Wis. 472, approved and followed. as supported equally by reason and authority.

Error to the Circuit Court of Brown County.

John P. Soquet was indicted for and convicted of murder in the first degree, and brings error.

Hudd & Wigman, for plaintiff in error.

C. E. Vroman and Assistant Attorney-General *L. K. Luse*, for the State.

ORTON, J. (November 8, 1888). The information charged the plaintiff in error with having murdered his wife, Esperance Soquet, on the 13th day of June, 1873, by poisoning, and the trial was had in April, 1888. The evidence tended to prove the following facts: The plaintiff in error and one August Mainsort, in June, 1873, lived as neighbors on farms one mile apart. The family of the plaintiff in error consisted of himself and his wife, Esperance, and seven children, and that of Mainsort consisted only of himself and wife; and a criminal intimacy appeared to exist between the plaintiff in error and the wife of Mainsort. Mainsort suddenly died, and, on autopsy, eight grains of arsenic were found in his stomach, and

the plaintiff in error was present, with his wife, at his death, and superintended and took great interest in his speedy interment. In about ten days afterwards, Esperance, the wife of the plaintiff in error, died, and a short time after that event the plaintiff in error married the widow of Mainsort. Esperance Soquet was a strong and healthy woman, and had borne eight children without unusual trouble. She was confined and brought forth a child on Monday morning under normal conditions, and passed through it safely. Dr. Munro, of Green Bay, was her attending physician, and he testified substantially that there was no indication of disease resulting from her confinement; but, that on Tuesday or Wednesday following, a great change had taken place in her condition, and she was very sick, and many things present, together with her symptoms, excited his suspicion that she had been poisoned with arsenic, and he made a diagnosis of her case sufficient to satisfy himself that she was suffering from some corrosive poison; and he made examination of the cooking utensils and other things for traces of poison, but found nothing. He then declined to treat her any further. In a very few days thereafter she died, and no autopsy was ever made to ascertain the cause of her death. Very soon after her death, her body became black, and much discolored. The plaintiff in error had been seen to give her mush, and to carry out of the room what was left of it, and to carry away the contents of her stomach by vomiting. The evidence, aside from these conditions observed by Dr. Munro and others, and from certain statements or admissions of the plaintiff in error, was circumstantial, and none of such admissions amounted to direct confessions. Over fourteen years had passed since the occurrence, and the events of that time, and such statements, or many of them, depended upon the memory of witnesses. The trial resulted in a verdict of guilty of murder in the first degree, and the plaintiff in error was sentenced to imprisonment for life.

The exceptions taken in behalf of the defendant, at the trial, are very numerous. But inasmuch as there may be no occasion for the same exceptions on another trial, we shall consider only such as are the most important and material, and upon which we are compelled to reverse the judgment of conviction.

The witness, Dr. Munro, made about the only diagnosis of the fatal sickness of the deceased; and he stated to the jury the various symptoms that came under his observation, and other witnesses testified to other symptoms and appearances. This witness having detailed the symptoms he had himself observed, was asked by the District Attorney, "What are the symptoms of arsenical poisoning?" Objection was made by the counsel for the prisoner that the witness was not shown to be an expert. The Court sustained the objection, until the witness could be further examined as to his qualifications to testify as an expert. He was thereupon asked, "Are you a member of any medical society?" and the witness answered, "Yes." He was further asked, "Graduate of any medical college?" and he answered, "No." He was then asked, "What medical society are you a member of?" and he answered, "Brown County." He was asked, "How long have you been a member of that society?" and he answered, "Ten or twelve years." He was then asked, "How long has your practice as a physician covered?" and he answered, "Twenty-five or thirty years." He was then asked, "Has it covered cases of poisoning?" and he answered, "Not that I remember just now." He was then asked, "Have you made a study of that branch of practice as well as other branches, and in the same way?" and he answered, "Just in the same way, yes." He was then asked, "State whether a knowledge of poisons and their effects is a part of the knowledge of a physician practicing?" and he answered, "It certainly is." He was then asked, "You may state what are the symptoms of arsenical poisoning?" This question was again objected to by the counsel of the prisoner, as the witness had not shown himself qualified, and the objection was overruled, and the counsel of the prisoner excepted to such ruling. The witness thereupon answered, stating the symptoms and appearances he had observed in the sickness of the diseased, and testified to by others, as the symptoms of arsenical poisoning. He was then asked, "What a livid appearance of the face indicated?" This question was also objected to, and the objection overruled, and exception taken. The witness answered, "An unhealthy circulation of the blood, for one thing." He was then asked, "In

connection with the symptoms you have described, what would it indicate, if anything?" The question was also objected to, and the objection was overruled, and exception taken. The witness answered, "Well, it would just indicate that the whole circulative system was suffering from something unknown, and possibly what I was suspecting;" and, under the same objection, he testified that certain appearances he had described, indicated arsenical poisoning, or other poisoning. On cross-examination, the witness, when asked, "Have you had a case of arsenical poisoning to treat yourself, individually, as a physician?" answered, "No;" and when asked, "Have you ever seen a person die, when you knew that he died from the effects of irritant poisoning—present at his death?" answered, "No;" and when asked, "Then all you know about what the symptoms of arsenical or irritant poisoning may be, is from theory, from your knowledge as a student of medicine?" answered, "And from books;" and when further asked, "And from reading scientific works upon that question?" answered, "Yes;" and when asked further, "Not from any practical observation of your own?" answered, "No."

Dr. Olmstead, offered as another medical witness and expert by the District Attorney, testified that he was a physician, and had been a practicing physician a little over thirteen years, and had been in practice all of the time, and was still practicing, and was then asked by the District Attorney, "Are you a member of any association?" and he answered, "Yes; a medical association; the Homoeopathic State Society of Wisconsin." He was then asked, "Has your practice covered cases of poisoning at all?" and he answered, "I never had a case of it." He was then asked, "Has your course of study and investigation carried you into the examination of symptoms of poisoning, and the effects of poison?" He answered, "Yes." He then testified that he had heard most of the testimony of Dr. Munro. An hypothetical question, claimed by the District Attorney to contain and embrace all the symptoms testified to by Dr. Munro, and other witnesses, and concluded with the questions: "What would you say was the matter with the patient?" and "What would be your diagnosis of the case?" This was objected to by the counsel of the prisoner

and the objection was overruled and exception taken, and the witness answered, "I should suspect that an irritant poison had been administered." He was then asked, "What irritant poison?" and he answered, "Arsenic." He was then asked, "Well, from the symptoms, as I have stated them, as compared with cholera morbus, which would you say the patient was suffering from?" and he answered, "I should say she was suffering from arsenical poisoning." On cross-examination, the witness further testified that he had never seen a case of arsenical poisoning, and never treated one, or seen one in his practice, and that all he knows about it, in relation to the effects of an irritant poison, was what he got from books and authorities that he had read and consulted, and from what he was taught at the medical college, without any practical knowledge or experience aside from that.

The testimony of these two medical witnesses was very material, if not indispensable, in proving an important element of the *corpus delicti*—that the deceased came to her death by criminal means. Dr. Munro was her attending physician, and upon his diagnosis, from actual observation of her symptoms, depended all of the medical testimony in the case. The Court, in instructing the jury, called their attention to the testimony of Dr. Munro particularly. It is true that there were two other medical witnesses who, in their practice, had each seen at least one case of poisoning by arsenic, who testified in answer to an hypothetical question embracing the symptoms testified to by others, that such symptoms indicated arsenical poisoning, but we cannot say that the verdict would have been the same without the testimony of Doctors Munro and Olmstead, and that it was therefore immaterial. It seems to us that the jury must have relied very much on their testimony. It is both surprising and unfortunate that upon such a long, difficult, and expensive trial of a case of murder in the first degree, the result should have been hazarded upon such a question as that of the qualification of the medical witnesses to give an opinion, that the symptoms of the last sickness of the deceased indicated poison by arsenic, when their disqualification was so apparent in the light of a recent decision of this court. Neither Dr. Munro nor Dr. Olmstead had ever seen a case, or had any

experience whatever on the subject of arsenical poisoning, and all that either of them knew upon the subject was derived from medical or scientific books, and medical instruction. In receiving their testimony, the Court committed and repeated the very error by reason of which the judgment in the case of *Boyle v. State* (1883), 57 Wis. 472, was reversed.

In that case Dr. Cody was allowed to testify as to what medical books and authorities said upon the subject of "strangulation," and that he did not know by experience of it, and had no personal knowledge on the subject. That case was unusually well considered, and the logic of the opinion is perfectly conclusive, and numerous authorities are cited to sustain the decision. Many cases in this State and elsewhere are cited, to show that medical works and authorities could not be read in evidence, and Mr. Justice TAYLOR well said: "Certainly, if the book itself cannot be read in evidence to the jury, the witness cannot be permitted to give extracts from it as evidence, depending upon his memory for their correctness. The palpable error in permitting Dr. Cody is apparent from the fact that he testified on the stand that he had no personal knowledge on the subject he was testifying about. He says, 'I have not seen a case of strangulation, and do not know by experience.'" I have quoted the testimony of Doctors Munro and Olmstead, by questions and answers, fully and correctly, that the application of *Boyle v. State* might clearly appear. The testimony of such medical witnesses is at best merely hearsay—what medical books and teachers taught or told them, repeated from memory. The learned counsel of the State asks this Court to review and overrule that case as not supported by authority. But it is supported by authority, and equally by reason.

The decision was made deliberately, and we can see no reason for revising or changing it. It is to be deplored that it escaped the attention of the Court and the counsel of the State, in a case of such serious consequences. The result and consequence of such a palpable error must be the same as in the case of *Boyle v. State*. The judgment must be reversed. It is more important to the public and the State than the con-

viction of the prisoner, that he be convicted, if at all, on legal and competent evidence.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial. The warden of the State prison will surrender the plaintiff in error to the sheriff of Brown county, who will hold him in custody until he shall be discharged by due course of law.

The Court, in deciding the above case and in laying down the test of a medical expert therein laid down, depends for its support upon the case therein cited of *Boyle v. State* (1883), 57 Wis. 472, of its own State, which holds that a physician cannot be permitted to give extracts from medical books as evidence, depending upon his memory for their correctness. This latter case again depends upon the case of *Stilling v. Town of Thorp* (1882), 54 Wis. 528, and numerous other cases cited therein, wherein a well established rule of evidence is followed, and that is, that medical books cannot be introduced or read in evidence. From this rule the Court reasons, in *Boyle v. State*, that inasmuch as medical books themselves cannot be read or introduced in evidence, it would be improper and in violation of such rule to allow extracts from such books to be introduced by way of the physician and his memory. Thus far the reasoning seems sound and logical, but to take the next step and hold, as the Court in the case under consideration does, with such ease and such emphasis, that, inasmuch as medical books themselves cannot be received in evidence, nor can a physician give extracts from them as evidence, a physician, therefore, is incompetent to testify as an expert, by reason of the fact that his knowledge of the subject matter is derived from such medical and scientific books and from instruction alone, without any practical experience,

is much more difficult and certainly challenges very careful investigation.

In taking this step, it would seem that the Court has failed to note any difference between the case under consideration and those of *Boyle v. State* and *Stilling v. Town of Thorp*—in other words, has failed to find any reasons why physicians, who have derived their knowledge of a subject from books, study and instruction alone, should be admitted to testify, while the books themselves, from which such knowledge is derived, should not be admitted as evidence.

The following reasons would seem to distinguish these cases, and will be found to be supported by authority, to wit:

First. The reading of such books would occupy too much of the time of the court and necessarily encumber and prolong its proceedings.

Second. It would be unsafe to take one book as authority, and would necessitate the introduction of many.

Third. A jury is ignorant of the matters of which such books treat, and cannot, of course, decide on their title to credit: *State v. Ferrell* (1859), 12 Rich. (S. C. Law) 321.

Fourth. A physician, with his mind trained and educated in such matters, can compare and weigh authorities, and, after careful research and study of the same, can come to wiser and safer conclusions.

Definitions.

[The term *expert* is derived from the Latin word, *expertus*, meaning practiced, experienced, skilled, and is defined to include one who is instructed by experience: Bouvier's Law Dict.; Anderson's Law Dict.; *Hyde v. Woolfolk* (1855), 1 Iowa 159, 167; *Estate of Toombs* (1880), 54 Cal. 509, 512-3.

"An expert is defined to be a person that possesses peculiar skill and knowledge upon the subject matter that he is required to give an opinion upon:" *State v. Phair* (1875), 48 Vt. 366, 377.

The Court, in *Dole v. Johnson* (1870), 50 N. H. 453, however, in commenting, said: "This definition is, perhaps, too narrow, for we must concede that there may be, in many instances and individuals, a higher degree of knowledge, not derived from, nor perfected, or enhanced by, a great amount, or even any degree of practical experience."

["We have endeavored to express the opinion of this Court upon the first question, that the disease of foot-rot in sheep, is a subject upon which the opinion of an expert can be received. Upon the second question, that the qualifications necessary to entitle Mr. Waite to testify are these: he must either be a veterinary doctor, qualified by some reading and study, as such, and having some practical experience in healing diseases of domestic animals, even though not practically acquainted with the disease of foot-rot in sheep, or else he must be really a man of science, qualified by a previous habit and course of attention, observation and special study, in the direction of the subject matter of his testimony:" per FOSTER, J., Id. 459. Here the witness testified, that, as editor of a stock journal, he had read extensively on the subject of foot-rot; and he named the works on that subject, which he had read. He also testified that he had had no practical

experience in the treatment of sheep for any disease: Id. 452.

"An expert must have made the subject upon which he gives his opinion, a matter of particular study, practice, or observation, and he must have particular and special knowledge on the subject:" DOR, J., *Jones v. Tucker* (1860), 41 N. H. 546, 548.

Men of Science.

[In the leading case on the admissibility of matter of opinion, Lord MANSFIELD said: "*Mr. Smeaton* understands the construction of harbors, the cause of their destruction, and how remedied. In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskillfully navigating ships. The question then depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the *Trinity House*. I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received:" *Folkes v. Chadd* (1782), 3 Doug. 157, 159.

Persons of Skill.

["On questions of science and trade, or others of the same kind, persons of skill may, no doubt, be permitted to give their opinions in evidence; because the jury, being wholly unacquainted with the particulars on which such opinions are founded, would be unable to draw any correct conclusion from hearing them stated; for instance, was a physician to state the particular medicine administered to a patient; from being unacquainted with the operation and effect of such medicine, the jury would be wholly incompetent to judge, whether such treatment would probably produce the death of the patient or not. * * * * In these, and similar cases, it is from

the opinion of persons skilled in the particular science or trade, and dealing in the particular article, that satisfactory evidence may be obtained; but when the necessity of admitting such evidence ceases, the exceptions to the general rule also cease:" GREEN, J., *Rochester v. Chester* (1826), 3 N. H. 349, 365. Under the stress of these last words, real estate experts were not allowed to testify to the value of a small piece of ground.

Experienced Persons.

[In *Ardesco Oil Co. v. Gilson* (1869), 63 Pa. 146, 151, SHARSWOOD, J., said—"An expert, as the word imports, is one having had experience. No clearly defined rule is to be found in the books, as to what constitutes an expert. Much depends upon the nature of the question in regard to which an opinion is asked. There are some matters of which every man, with ordinary opportunities of observation, is able to form a reliable opinion: *Wilkinson v. Moseley* (1857), 30 Ala. 562; *Dewitt v. Bailey* (1858), 17 N. Y. 340. It is not necessary, as it is said in one case, to call a drover or butcher to prove the value of a cow: *Ohio R. R. Co. v. Irwin* (1862), 27 Ill. 178. Nor is it imperatively required that the business or profession of the witness should be that which would enable him to form an opinion: *Van Deusen v. Young* (1858), 29 Barb. 9; *Smith v. Hill* (1856), 22 Id. 656; *Price v. Powell* (1850), 3 Comstock (N. Y.) 322; *Fowler v. Middleton* (1863), 6 Allen (Mass.) 92. In *Phillips v. Gregg* (1840), 10 Watts (Pa.) 158, witnesses who were not lawyers by profession, were received to testify as to what constituted a lawful marriage in the settlements of the Mississippi valley half a century before. While, undoubtedly, it must appear that the witness had enjoyed some means of special knowledge or experience, no rule can be laid down,

in the nature of things, as to the extent of it. It must be for the jury to judge of the extent of it." In this case a steam-fitter, with no knowledge of stills beyond that acquired from working on them, was allowed to testify as to the sufficiency of the strength of the iron used.

[In the case of *Phillips v. Gregg*, just cited, ROGERS, J., said—(p. 169)—"Foreign unwritten laws, customs and usages, may be proved, and must ordinarily be proved by parol evidence. And the usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath. But although these are the usual modes of authentication, yet they may be relaxed, or changed, as necessity, either physical or moral, may require, where there is reason to believe they are unattainable, and where a rigid adherence to them may probably produce extreme inconvenience or manifest injustice. In short, the peculiar circumstances of the case must enter largely into the consideration of the question of the competency of the evidence."

[“There is a class of cases, however, depending upon questions involving a degree of skill and judgment such as is necessarily confined to a few individuals, exercising a particular science, art or profession. Such cases form an exception to the rule laid down, and the jury must necessarily depend, in the determination of such questions, not upon the exercise of their own judgments upon the facts, but upon the opinions and conclusions of others. It is manifest that this class of cases should not be unnecessarily extended, and that the opinions of experienced persons, in matters of skill and judgment, should not be admitted, except where they are the only means by which the jury can come to a correct conclusion:" UPHAM, J., *Peterborough v. Jaffrey* (1833), 6 N. H. 462, 463. And, accordingly, the

evidence of real estate experts, as to the ordinary value of land, was excluded.

Of Particular Science or Skill.

["It is often very difficult to determine in regard to what particular matters and points witnesses may give testimony, by way of opinion. It is doubtful whether all the cases can be harmonized, or brought within any general rule or principle. The most comprehensive and accurate rule upon the subject we believe to be as follows: That the opinion of witnesses possessing peculiar skill is admissible, whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it:" DAY, J., *Muldowney v. Ill. Cent. R. R. Co.* (1873), 36 Iowa 462, 473. And brakemen, conductors and baggage masters were held incompetent to give an opinion upon the danger of coupling cars.

["The opinion of the witness, respecting the value of the sled, was not admissible in evidence: *Rochester v. Chester* (1826), 3 N. H. 349; *Peterborough v. Jaffrey* (1833), 6 Id. 462. He was not a manufacturer of sleds, if that might be supposed to indicate skill, nor was he otherwise possessed of any particular science, or skill, respecting their construction or use. The fact that he had used sleds more than people in general, and had bought and sold many, might serve to show that he had more knowledge respecting the best form and size, and respecting the price at which they could be purchased or sold, than many others; but this is not sufficient to give him the character of an expert:" PARKER, C. J., *Beard v. Kirk* (1840), 11 N. H. 397, 400.

Of Practical Skill or Scientific Knowledge and Experience.

[Where a locomotive had exploded and killed the engineer, it was insisted, by the railroad company, "that the testimony of certain witnesses, whose occupation was that of boiler makers, was improperly received, as by their own testimony, they were incompetent to testify as experts. They all showed that, for a long time, they had been engaged in making boilers, and some of them showed experience in testing boilers. They testified to their knowledge and experience, as to the matters enquired of. Their testimony was clearly competent. The amount of weight to which their testimony was entitled, was a question for the jury to determine. Courts cannot establish a standard by which to measure expert witnesses. If they show that they have practical skill, or scientific knowledge and experience, as to the matters under investigation, they are competent to testify:" REESE, J., *S. C. & P. R. R. Co. v. Finlayson* (1881), 16 Neb. 578, 587.

A Skillful or Experienced Person.

[On an issue of insanity, it was contended that the trial judge erred in refusing to permit a consulting physician, Dr. Russell, "to give his opinion, based upon what he learned from the nurse and wife of the defendant and of the attending physician, taken in connection with his personal examination. It is asserted that the information obtained from those sources became part of the personal examination of the witness, and, as such, formed a proper basis for a professional opinion which would be competent and legitimate evidence in the case; and, further, that the professional skill which would authorize the witness to testify to his opinions concerning the malady of a patient whom he has examined, authorizes him also to judge of the proper sources, in connec-

tion with his personal examination, from which to derive these opinions. * * * * The proposition contains two fundamental errors. First, it makes the witness decide the question of the competency of evidence, thus putting him in the place of the Court. Next, while it excludes the declarations as incompetent testimony to go to the jury, it receives, as competent evidence, an opinion based upon that incompetent testimony, thus attempting to elevate the stream above the fountain, to make a corrupt tree bring forth good fruit. * * As a witness cannot be permitted to give his opinion as an expert, until it appears, by a preliminary examination, that he is a person of skill in the particular department, or subject matter in which his opinion is desired; so, too, it must appear that he has reliable information, or knowledge of the facts involved, and upon which his opinion is to be founded, before he can testify as an expert. * * * The very foundation for the theory of expert testimony is that of his superior knowledge in relation to the subject matter of which he is permitted to give an opinion, by which he, in a degree, assumes the functions of the jury." *RICE, J., Heald v. Thing* (1858), 45 Me. 392, 395.

["In the examination of experts, it is only necessary to keep constantly in view that their proper office is to instruct the Court and jury, in matters so far removed from the ordinary pursuits of life, that accurate knowledge of them can only be acquired by continued study and experience; the purpose is to enable both the Court and jury to judge intelligently of the force and application of the facts introduced in evidence, as they would have been able to do if they had been persons properly instructed upon the subjects involved:" *CLARK, J., Coyle v. Comm.* (1883), 104 Pa. 117. This was said, as the introduction to a discussion of the form of questions, to

be put to an expert, for his opinion upon the facts in evidence upon a trial for murder.

Skillful or Scientific Men.

["As a general rule, the opinion of witnesses is not admissible in evidence. They must speak to facts within their knowledge. But upon questions of skill or science, with which a jury may not be supposed to be familiar, men who have made the subject matter of inquiry, the object of their particular attention or study, are competent to give their opinion. It must, however, be first shown that they are skillful or scientific men, or at least that they have superior actual skill or scientific knowledge in relation to the question, before their opinions can be competent. Mere opportunity for observation is not sufficient. * * * In the present case, Stephen Walker was permitted to give his opinion as to the quality of the soapstone in the quarry in controversy. This was peculiarly a question of scientific skill and knowledge, which the witness was not shown to possess. It only appeared that he had been more or less engaged for forty years in quarrying soapstone. * * But it did not appear that he had ever devoted any time or study to an investigation of the composition and characteristics of soapstone, or made any particular observations on that subject, so as to be better qualified to give an opinion on the scientific question propounded to him, than any member of the jury:" *FOWLER, J., Page v. Parker* (1860), 40 N. H. 47, 59.

In *Central Railroad v. Mitchell* (1879), 63 Ga. 173, [a witness was allowed to testify "that he was a civil engineer, had surveyed railroads, including this particular road at the place of the accident. He gave considerable amount of evidence as to the depth, width, etc., of the cut," where an engineer was hurt by the derailment of his

locomotive through the washing down of the side of the cut. The witness also said—"The rules for construction of cuts, etc., which I have given, are found in books on engineering. I give these rules solely from what I recollect of the books. These rules are found in Mahan, Gillespie and Gilmore, and many others:" Id. p. 177. JACKSON, J., said—"The expert was competent to testify. Every expert derives much of his knowledge from books as well as from experience, and can give his opinion based upon the knowledge acquired from both sources:" Id. 180.

Summary.

From the above authorities and definitions it will be seen that the word "experience" is used many times, but in most cases is either so qualified, or used in the alternative, as to remove its necessity.

Necessity of Experience.

In the case of *Fairchild v. Bascomb* (1862), 35 Vt. 398, 410, the Court says, in passing, that a person who was merely by education a physician, if he had not practiced his profession, would not be deemed admissible as an expert, but does not base its decision on this point, as the case was opened up on other grounds. [However, in another branch of the case, the Court said: "Persons who are much accustomed to attend upon the sick, to watch the progress of diseases to their end, and to be with the dying, are, by their experience, enabled to form a better judgment as to the cause of disease and its probable effect upon the body and mind in the last hours of life, than others who have no such opportunity. Physicians who are in general practice, and nurses, thus become experts in such matters, so far as experience and observation can furnish knowledge. * * * In such cases, however there is so little uniformity in

the effects of diseases upon the mind just before death, that the mere opinion of a physician as to the matter, would obviously be evidence greatly inferior in value to the actual observation of an intelligent bystander:" ALDIS, J., Id. 408, 409. This decision does not seem to agree with those just cited, nor with the principal case: See *infra*, under *Profession or Occupation and Experience, both necessary*. The same court denied the attribute of expert to one merely experienced, in *Oakes v. Weston*, (1873), 45 Vt. 430, where the Court excluded one, who was asked his opinion upon the unreasonableness of a load, from experience in driving over the same road.

[In this connection it may be observed that one who had attended the deceased as his physician and was called "Doctor," and had attended to a drug store for some years, but was not a physician, was admitted by the same court to testify as an expert. The proof "addressed itself to the jury, and under a proper direction from the Court, should have induced the jury to accord little weight to the professional opinions of the witness:" COLLIER, C. J., *Washington v. Cole* (1844), 6 Ala. 212, 214.

Lawyer as an Expert in Another Profession.

[See, also, *supra*, under *Experienced Persons*.

[Where a lawyer, who had been in practice for sixteen years, was called as a medical expert upon the diseases of women, he was admitted upon his statement that he had, previously to his admission to the bar, attended a course of medical lectures, and had obtained a license from the State board of physicians, under which he had practiced medicine for one year. The witness also stated that he had continued to read medical works and felt competent

to express an opinion : *Tullis v. Kidd* (1847), 12 Ala. 648.

["One who exercises an art or trade is supposed to be acquainted with it. Thus, a practicing physician would be presumed, from that circumstance alone, to be acquainted with the cause, and cure, of diseases; but it by no means follows that one who is not in the actual practice of medicine may not be skilled in the science, so as to be able to give correct opinions as to the existence, or cause, of disease. Clinical practice is doubtless a most efficient mode of acquiring such knowledge, by enabling the practitioner, from his own observation, to verify the assertions, or theories, of others, or to correct errors into which they may have fallen; and it may be that medical opinions not brought to this test, are not worthy of much reliance as the basis of a verdict of a jury. But, if one asserts an ability to give correct opinions upon any art, or science, from an acquaintance with the subject, acquired by observation and study, we cannot perceive on what ground he can be rejected, because he has not been in the actual practice of his profession. This circumstance, as already observed, may deprive his testimony of much weight with the jury, but it is no ground for excluding it. So also, among physicians in actual practice, superior skill, greater power, or opportunity for observation, may entitle the opinions of one, to much greater weight than those of another, although both are equally competent in legal estimation :"] ORMOND, J., Id. 649-50.

[This case was affirmed in *Rash v. State* (1878), 61 Ala. 89, 95.

On the other hand, in *Missouri Pac. Ry Co. v. Finley* (1888), 38 Kan. 550, HORTON, C. J., said : "Upon the trial, C.W. Johnson who testified that he was a lawyer, by profession, and not a doctor or veterinary surgeon, was allowed to give his opinion as to the symptoms and

causes of Texas fever; and, also, was permitted to testify that the cattle communicating the Texas fever to domestic cattle in this State, came from that part of Texas south of latitude thirty-five. In order to determine whether the witness was competent as an expert, the following examination was had : Q. I will ask you if you have read a great deal upon the subject of Texas cattle? A. Yes, sir. Q. And your information is principally derived from the knowledge you have derived from reading in regard to it? A. From books; yes, sir. Q. Some little observation? A. Yes, sir; from the testimony of experts, taken in a case in which I have been interested as a lawyer. Q. Case in court? A. Yes, sir. Q. The principal portion, if not all, is from knowledge derived from books and the testimony of experts in court? A. Yes, sir. Upon this testimony, it does not appear to us that the witness possessed the legal qualifications of an expert. Where a person has been educated in a particular profession, as a physician, surgeon, or veterinarian, he is presumed to understand thoroughly the questions pertaining to his profession; but a person, not a member of those professions, who has read extensively from books and heard the testimony of experts in court, in regard to the diseases of men or cattle, is not considered an expert concerning the same :"] Id. 560-1.

[So, in *Hass v. Marshall*, decided May 25, 1888, the Supreme Court of Pennsylvania held a practicing attorney incompetent to testify as to the chemical purity of certain whiskey. He had never been a practicing chemist, and could not make a quantitative or qualitative analysis, except as directed by a pamphlet on the subject of adulterated liquors; had studied medicine for three years; had been at the bar for forty years.

[The tendency of the latter decisions

would seem to be governed by the maxim: the law is a jealous mistress.

[The principle involved in the second of these cases was asserted by the Supreme Court of Michigan, in *Wicks Bros. v. Swift E. L. Co.*, decided May 18, 1888. A witness was not allowed to testify as an expert, when his qualifications were the result of conversation with mechanics and machinists about the cost of altering an engine.

Profession or Occupation, without Experience.

Any practicing physician is competent to express an opinion, as an expert, on a medical question: *Livingston's Case* (1857), 14 Grat. (Va.) 592; *State v. Clark* (1881), 15 Shand (S. C.) 403.

["Doctor Addy, as stated in the report" of the trial judge, "was an experienced physician, and was, in law, an expert as to all matters embraced within the range of his profession. Had he seen the dead body, therefore, when first found on the railroad track, there could be no doubt that his opinion, as to the length of time it had been dead, would be competent, on the ground that he was an expert, and this fact is within the range of his profession. But this principle, as appears from the authority already cited," 1 Greenleaf Ev. § 440, "does not confine the opinion of the expert, to facts coming under his own observation alone, but it permits him to found and express his opinion upon facts testified to by others. This was all that was done in this case, and the authority from Greenleaf seems to be directly in point. It fully warranted, in our judgment, the ruling of the circuit judge as to the competency of Doctor Addy's opinion:" SIMPSON, C. J., *State v. Clark* (1881), 15 Shand (S. C.) 403, 408. The doctor examined the body after it had been removed to the railroad station.

[Where a druggist sold sulphate of

zinc by mistake for Epsom salts, "a supposed medical expert" was permitted "to testify to the effects of sulphate of zinc when taken into the system, from what he learned on the subject from books of recognized authority. The evidence was not incompetent. *Collier v. Simpson* (1831), 5 C. & P. 73; *Taylor v. The Railway* (1869), 48 N. H. 304. It was not very satisfactory expert evidence, but its weight was for the jury:" COOLEY, J., *Brown v. Marshall* (1882), 47 Mich. 576, 578.

A physician having no practical experience in analysis of poison, but acquainted with the means of detecting it, is competent as an expert: *State v. Hinkle* (1858), 6 Iowa 380. [The prisoner was convicted of murder by poison. "Two physicians were called and testified as to the tests applied in the chemical analysis made of the stomach of the deceased, and also of the tests usually applied for detecting the existence of poison in such cases. Both of them testified that they were practicing physicians. One of them stated that he was not a professional chemist, but understood some of the practical details of chemistry—that portion, at least, which pertained to his profession; that he had no practical experience in the analysis of poisons, until, in connection with Doctor Francis, he analyzed the contents of the stomach of the deceased; that since that time he had conducted experiments upon a small scale; and that he was previously acquainted with the means of detecting poisons, and had since had some experience in that way. The other testified that he was not a practical chemist; that he did not follow the science as a profession; that he understood the chemical tests by which the presence of strychnine can be detected; that he professed to understand the principles of chemistry, as laid down in the books on that science; that he never experi-

mented with a view to detect strychnine by chemical tests; that he had seen experiments by professors of chemistry; and that there was one test much relied on, the trial of which he had witnessed. Defendant objected to these witnesses as incompetent, and now urges that they did not show themselves possessed of the requisite professional skill. We think they were competent witnesses:" WRIGHT, C. J., *Id.* 385-6.

["It is, of course, desirable that great caution should be exercised in conducting experiments of this character," that is, in analyzing the contents of a stomach in case of death from supposed poisoning by strychnine, "and that the most skillful professional aid should be secured. If conducted, however, by such as have not had experience, or by those who, though not practical chemists, give their opinions from knowledge derived from the books upon that science, such opinions would be entitled to less weight than if given by a practical chemist—he who bases his conclusions upon experience as well as books. The means of knowledge are proper to be considered by the jury, and they should give, or withhold, credence in the opinion given, as they may believe the expert qualified to speak more or less intelligently and understandingly. But to say that none shall be permitted to give their opinions, except those of the highest professional skill, or those who had given their lives to chemical experiments, would, in this country at least, render it impossible, in most cases, to find the requisite skill and ability:" WRIGHT, C. J., *State v. Hinkle* (1858), 6 Iowa 380, 386.

[Where the seller of a horse was sued for breach of warranty of soundness, a medical witness for the defendant "had already stated that he had read various standard authors on the subject of diseases, and had given his own opinion, in respect to the character of the disease of which the animal died. Certainly it

was proper, at that stage of the inquiry, to ask the witness for his best medical opinion, according to the best authority:" JOHNSON, J., *Pierson v. Hoag* (1866), 17 Barb. (N. Y.) 243, 246.

Profession or Occupation, and Experience, both Necessary.

[This is the doctrine of the principal case, and is not without some support from other courts. It was strongly affirmative of the remark of TAYLOR, J., in *Boyle v. State* (1883), 57 Wis. 472, cited in the principal case, *supra*, 485. This position had been taken by the court as far back as 1849, where the court below refused to allow a medical expert called in a case of nuisance from the erection of a mill-dam, to answer the question, "Is it not a well ascertained fact in medical science that the malaria spoken of will not cross a stream?" STOW, C. J., in affirming this ruling, said: "Was it intended that the witness should testify from his 'scientific knowledge,' derived from medical and philosophical works, as to facts, or, rather, examples and particular experiments therein related? or was he to speak from his 'scientific knowledge,' derived from his personal examination of certain ditches? If from the latter, the question was in no wise different from many others which were permitted to be answered. If from the former, the testimony would have been mere hearsay:" *Luning v. The State* (1849), 2 Pin. (Wis.) 284, 288.

The case of *Emerson v. Lowell Gas Light Co.* (1863), 6 Allen (Mass.) 146, holds that the mere fact that the witness "was a physician, would not prove that he had any knowledge of gas, without the further proof as to his experience; for it is notorious that many persons practice medicine who are without learning; and a physician may have much professional learning without being acquainted with the properties of

gas, or its effects on health:" CHAPMAN, J., p. 148.

[Wharton notices this decision, as contrary to his own statement that an expert "need not be exhaustively acquainted with the *differentia* of the specific specialty under consideration," and adds, "If this were necessary, few experts could be admitted to testify; certainly no courts could be found capable of determining whether such experts were competent. A general knowledge of the department to which the specialty belongs would seem to be enough. Thus, a physician, not an oculist, has been permitted to testify as to injuries of the eye" (*Castner v. Sliker* (1868), 33 N. J. L. 95, 507; *State v. Sheets* (1883), 89 N. C. 543), and other examples: 1 Whart. Ev. § 439.

[The second of Wharton's citations is apt to the present annotation. "Dr. Lewis stated that he had attended lectures at a medical college and had practiced his profession for seven years; that, although he had never been called to a case of poisoning, he had experimented some with poison on dogs and other animals, and he thought he was qualified to give an opinion as to the effects of poison. Dr. Bulla testified that he had been a practicing physician since 1845, and he had had some experience of the effect of poison on the human species, but very little in regard to brute animals, and he thought he was competent, to a certain extent, to give an opinion. There was no error in the ruling of his Honor, that both of these physicians were competent to testify as experts. When the professors of science, as physicians, for instance, swear that they are able to pronounce an opinion in any particular case, although they say, at the same time, that precisely such a case had not before fallen under their observation, or under their notice in the course of their reading, it

is competent to give in evidence, their opinion: *State v. Clark* (1851), 12 Ired. (N. C.) 151. To the same effect is *Horton v. Green* (1870), 64 N. C. 64, which was an action to recover damages for deceit in the sale of a mule alleged to have glanders. One Dr. Rivers was examined, who had been practicing his profession for eleven years. When asked whether, from his general knowledge of disease, he could tell whether the symptoms, in that case, indicated that the disease was of long standing or not, he answered that he had no particular acquaintance with the diseases of stock, but from his books, observation and general knowledge of diseases of the human family, he could tell whether certain symptoms indicated that a disease of recent or long standing, though he had never seen a case of glanders, unless that was one. It was objected that the witness had not qualified himself to answer as an expert, but this Court held that he was competent:" ASHE, J., *State v. Sheets* (1883), 89 N. C. 543, 549.

Post Mortem Examination.

In *State v. Cole* (1883), 63 Iowa 695, [the defendant was convicted of poisoning his wife, while in childbirth. Upon appeal, the defendant assigned "as error, that the Court erred in allowing certain physicians to testify, as experts, to having made a *post mortem* examination, and to having found indications of arsenic in the stomach of the deceased. * * * * The physicians who testified, were shown merely to be physicians of considerable length of standing in practice. Whether such persons should have been held to be qualified to testify as experts, in respect to the *post mortem* examination, and indications of arsenic, is a question upon which we are not entirely agreed. The *post mortem* examination of a human stomach, for the detection of indications

of poison, does not necessarily come within the experience of a medical practitioner. But toxicology is treated as a branch of medical jurisprudence, and it may be regarded as belonging to medical science. On a question, then, as to whether a person is qualified to make a *post mortem* examination of a human stomach, and testify to indications of arsenic, it would be proper to allow evidence that he is a medical practitioner. We do not say that the Court, upon such fact alone being shown, should necessarily allow him to testify. We merely say that, if he is admitted upon such fact, the Court does not act wholly without evidence. This matter of passing upon expert qualifications is not one that is subject to very well defined rules. * * * It may be conceded that when a witness is offered as an expert, the Court would not be justified in allowing him to testify against the objection of the party, against whom he was offered, until some evidence was introduced that the witness was possessed of the requisite character. Where, however, as in this case, the witness has once been admitted by the Court to testify, the weight that should be given to his testimony becomes a question for the jury, and in a proper case they would be justified, doubtless, in disregarding his testimony entirely :” ADAMS, J., Id. 698, 699, 702.

[Upon an indictment for murder, charged to have been caused by an effort to produce an abortion, “ a witness testified that he was an experienced medical man, and that he made a *post mortem* examination of the body. He was then asked by the counsel for the State whether he believed the deceased had been with child, and, if so, what were his reasons for such belief. This question was objected to. But it was allowed, on the ground that the witness was an expert; and he stated his belief that she had been pregnant, and de-

scribed the appearances of the body, which led to that belief. He was also, against the objection of defendant’s counsel, allowed to offer his opinion as to the cause of her death :” *State v. Smith* (1851), 32 Me. 369, 370.

[See, also, *supra*, *Profession, or Occupation, without Experience*.

Symptoms of Poison.

In *State v. Terrell* (1859), 12 Rich. Law (S. C.) 321 [the defendant was convicted of murder by poisoning and appealed for a new trial, on the ground that medical witnesses, who admitted that they had not themselves seen the human system under the known operation of strychnine, were permitted to testify from information confessedly derived from their books what effects were produced by it on the system, and, consequently, what were the symptoms of poisoning by strychnine. “ The character and effects of strychnine were properly inquired into from the physicians. It is but recently known as a poison, and the most experienced physicians have had little opportunity of judging of its effects on the human system from cases within their practice. Five medical men were examined, only two had had the opportunity of testing its effects. But they are concurred in pronouncing that the cases under their treatment and observation, at this time, were affected by strychnia. Their judgments were formed from their previous course of habit and study. * * * But a medical man, having acquired his knowledge from books, lectures and oral instruction, is prepared to decide upon the character of the poison, and its effects, and his title to credit, both scientifically and otherwise, can be judged of, from his examination, by the jury :” O’NEALL, J., Id. 328.

[Upon a trial for murder by the same poison, EAKIN, J., *Polk v. State* (1880), 36 Ark. 117, 123, 124, said—“ It should

have been first shown that Dr. Curtis was qualified to speak as an expert, from study and experience in medicine. It would not have been objectionable, then, to have asked him to describe, generally, the symptoms of strychnine, in the human system, because these are facts of science, depending upon the course of nature, although coming seldom under the observation of others than experts in medicine. And if it had stopped there, it would have been competent for the jury to have compared the symptoms testified to by the witnesses with those given by the expert, as to the usual effects of strychnine, as affording some tendency to prove the manner of the death."

[See, also, *supra*, under *Profession or Occupation and Experience, both necessary*.

Effect of Drugs.

A physician, testifying as an expert, to the effect of oil of savin, in producing an abortion, may give an opinion founded upon his reading and study alone: *State v. Wood* (1873), 53 N. H. 484. ["It is settled, in *Taylor v. Railway* (1869), 48 N. H. 304. * * * This case, we think, fully sanctions the direct examination of this witness, upon a subject where his knowledge was derived from books alone; and the cross-examination was simply the testing of the correctness of his opinion by the same standard upon which the opinion was founded,—the authority of the medical books which he had read. * * * He had stated, as well he might, on direct examination, his knowledge of a particular subject, not from any experience or actual observation, but from what he had derived merely from reading and studying medical authorities. Then he was cross-examined as to that general reading, not by putting in the books, but by inquiries whether, in his general reading, he had not found partic-

ular theories laid down, conflicting with the theory he had advanced as the result of his reading. *Collier v. Simpson* (1831), 5 Car. & Payne 73, goes further than the present case. There TINDAL, C. J., in speaking of a medical expert, says: 'I think you may ask the witness whether, in the course of his reading, he has found this laid down.' And that was upon direct examination: ". SARGENT, C. J., Id. 494, 495.

Mental Condition.

[Where, on an issue of *devisavit vel non*, and allegations of undue influence and want of a sound and disposing mind, both of the attending physicians in the last illness "were rightly permitted to testify to their opinion of" the testator's "mental capacity, immediately before and after the execution of his will, accompanied by the symptoms and appearances upon which that opinion was formed," though neither physician had any special skill in mental diseases and had never attended the testator previous to his last illness of only four days' duration: *Hastings v. Rider* (1868), 99 Mass. 622, 623, 624, 627. This case was really affirmative of *Baxter v. Abbott* (1856), 7 Gray (Mass.) 71. To the same effect, though the physician was not in attendance, but acquainted: *Bitner v. Bitner* (1870), 65 Pa. 347. *Contra*, *Russell v. State* (1876), 53 Miss. 367.

["The State introduced Doctor Brock," in a trial for murder, "who testified that he was a physician and surgeon of fourteen years' practice and experience, had studied psychological medicine some, and had had experience in the incipency of mental diseases. The witness then testified as to certain methods of investigating the sanity or insanity of a person, and was then asked this question: "Would not the manner in which the act was done, the circumstances of the case, the absence or pres-

ence of apparent motive, and the whole details of the transaction, be considered by scientific men in determining the question of sanity or insanity?" This question was objected to, because the witness had not shown that he had made disease of the mind a special study. The objection was overruled, and, we think, correctly. He had brought himself within the rule admitting his testimony as an expert. See 1 Greenleaf Ev., § 440. The extent of the witness's knowledge of a particular branch of medical science, only goes to the credibility of his testimony: *KINGMAN, C. J., State v. Reddick* (1871), 7 Kan. 143, 150. To the same effect, *Davis v. The State* (1871), 35 Ind. 496.

Specialist not Required.

[Where a life insurance company defended against the payment of a policy on the ground of suicide, practicing physicians and surgeons were admitted as experts, without showing that they had made insanity a specialty: *Hathaway's Admr. v. Nat'l L. Ins. Co.* (1875), 48 Vt. 335. Similarly, *Barnes v. Ingalls* (1863), 39 Ala. 193, in the case of a photographer called to testify to the value of the services of a photograph painter.

[See also, *supra*, *Mental Condition*.

Amount of Experience.

In *Gilmore v. Brast*, decided September 5, 1888, the Supreme Court of Minnesota held competent a practicing physician and surgeon, in a case for damages for the value of a mare, alleged to have been killed by negligent handling of a stallion. The witness "had had more or less veterinary experience while practicing medicine; and, to use his own words, was familiar, 'to a moderate extent,' with the anatomy of the horse."

["The testimony of Doctors Cotting Cheever and Foye was properly ad-

mitted. All of these witnesses were present at the autopsy of the murdered child and examined her head, and no question was made as to their competency as medical experts. The only part of the testimony objected to at the trial was that to the effect that, in their opinion, the injuries to the head could not have been produced at the same time and by one blow. This subject was within the range of the experience of medical experts accustomed to observe the effect of blows upon the human head, and was one upon which their judgment would aid the jury:" *MORTON, J., Comm. v. Piper* (1876), 120 Mass. 185, 189.

Sources of Information: See under *a skillful or experienced person*, and *skillful or scientific men, supra*.

Weight of Opinion.

[In *Grigsby v. Clear Lake Water Co.* (1870), 40 Cal. 396, 405, *TEMPLE, J.*, in delivering the opinion of the Court, said—"Ordinarily, it is true, witnesses testify only as to facts, leaving it to the jury to draw their conclusions, but upon matters of science and questions requiring peculiar skill, an exception is made. These witnesses ought, perhaps, to be selected by the Court, and should be impartial, as well as learned and skillful. A contrary practice, however, is now probably too well established to allow the more salutary rule to be enforced, but it must be painfully evident to every practitioner that these witnesses are generally but adroit advocates of the theory upon which the party calling them relies, rather than impartial experts, upon whose superior judgment and learning the jury can safely rely. Even men of the highest character and integrity are apt to be prejudiced in favor of the party by whom they are employed. And, as a matter of course, no expert is called until the party calling him is assured that his opinion will be favorable. Such

evidence should be received with great caution by the jury, and never allowed, except upon subjects which require unusual scientific attainments or peculiar skill."

On a trial for murder by poisoning by arsenic "the physician whose opinion was excepted to at the trial, was competent from his long experience in the practice of his profession" (for forty years), "and with the knowledge and information he was shown to have of the symptoms of the malady of the deceased, to testify as an expert. It was for the jury to decide whether his testimony should influence their verdict, for, or against, the defendant:" MANNING, J., *Mitchell v. The State* (1877), 58 Ala. 417, 418.

["Where, on cross-examination, the" medical "witness said that if he had not been informed that there was arsenic in the house, he would not have concluded that the sickness and death were caused from poison by arsenic, but, learning this fact, he came to the conclusion he did, from observation of the symptoms of the case, and from having heard that Sam Hooks had arsenic in the house; certainly this acknowledgment greatly impaired the

force of his testimony as evidence against the prisoner, but it was not inadmissible. There was no error in the refusal to rule it out:" MANNING, J., *Mitchell v. The State* (1877), 58 Ala. 417, 419-20.

[On a trial for manslaughter, opposing medical witnesses were interrogated as to the reputation of the physician who attended the wounded man, though the capacity of such physician was not otherwise impeached. This was error, PETERS, J., saying—"A physician is an expert, and as such he may be asked questions which develop his capacity to form a correct judgment upon the experiences of his profession; but his reputation has nothing to do with this; and it can only be sustained when it is impeached:" *DePhue v. State* (1870), 44 Ala. 32, 39.

The better rule would seem to be that actual experience is not necessary to render a physician competent as an expert on a particular question, but that lack of it may and should be considered by the jury, in connection with his other qualifications, in determining the weight to be given to his testimony.

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ABSTRACTS OF RECENT DECISIONS.

ADMIRALTY.

Damage by bridge over navigable waters to a vessel passing through the draw, is within the jurisdiction of an admiralty court. *City of Boston v. Crowley*, U. S. C. Ct., D. Mass., March. 21, 1889.

Scow platform, a floating structure designed to be moored alongside a wharf, so that carts containing refuse to be dumped into boats can be driven over it, is not a vessel within the meaning of the maritime law, and no lien for wharfage attaches to it. *Ruddiman v. A Scow Platform*, U. S. D. Ct., S. D. N. Y., March 30, 1889.

Steamship at wharf was given the key-berth previously occupied by another vessel, and the latter was moored outside, with no means of communication with the wharf, except across the deck of the inner vessel; negligence in permitting this deck to be in a condition unsafe for passing over it, whereby personal injuries were sustained, was a marine tort, and within admiralty jurisdiction. *Anderson v. The E. B. Ward Jr.*, U. S. C. Ct., E. D. La., Feb. 15, 1889.

Tug, contracting to convey a tow to its destination, must do so expeditiously, by the most direct customary route, exercising proper care and skill in doing so, and, if a disaster occur while the tug is violating her duty in this respect, the burden is on her to prove that it was unavoidable and did not result from her disregard of duty. *Phillips v. The Sarah and The Tucker*, U. S. D. Ct., E. D. Pa., March 19, 1889.

ARREST.

Assault and battery may be recovered from an officer of the law who has inflicted serious injuries upon a person whom, in the course of his official duty, he is called upon to take into custody, no resistance having been made to the arrest and there being no necessity for the use of violence. *Schwenke v. Union Depot and R. R. Co.*, S. Ct. Colo., March 8, 1889.

ATTORNEY-AT-LAW.

Contract between certain attorneys-at-law and certain persons engaged in the illegal sale of intoxicating liquors, providing that the former shall, during one year, for a monthly compensation of \$80, payable on the first of each month, defend all cases brought against the liquor sellers for violation of the prohibitory liquor laws, is against public policy and void. *Bowman v. Phillips*, S. Ct. Kan., April 5, 1889.

Professional misconduct, so far as the power of the court to discipline an attorney is concerned, is not subject to the bar of the statute of limitations, either expressly or by analogy. *In re Rowenthal*, S. Ct. Cal., March 21, 1889.

BANKS AND BANKING.

Banking firm was mailed checks for collection by a correspondent bank, but before their receipt the firm was dissolved by the death of one of its members; the surviving partner paid the checks by charging them to the accounts of the drawers and gave the bank credit on the books of the firm for the total amount; he subsequently made an assignment for the benefit of creditors, transferring the moneys realized from the checks to his assignee; the bank was entitled to recover such moneys, which were easily traceable on the firm books, from the assignee. *First Nat. Bank of Alexandria v. Payne's Assignees*, S. Ct. App. Va, March 21, 1889.

Collections made by one bank for another, although the paper was marked "For collection and immediate return," were mingled with other funds of the collecting bank which became insolvent before any remittance had been made; the forwarding bank was entitled to no preference for such collections over the claims of other creditors. *Philadelphia Nat. Bank v. Dowd*, U. S. C. Ct., E. D. N. C., Feb. 16, 1889.

Payment of check drawn by a trustee upon the trust fund, is conclusive upon a bank, even though it were given for a debt which had no connection with that fund, but was against another estate, of which the drawer was also trustee, and which had no funds to its credit, and the bank cannot recover back the amount of the check from a payee, who received it in good faith and without any notice of the misappropriation. *Manufacturers' Nat. Bank v. Swift*, Ct. App. Md., March 27, 1889.

BILLS AND NOTES.

Accommodation note was sold to a private person instead of to a bank, as was "understood and agreed upon" between the maker and the accommodation endorser; this fact constituted no defence to an action by the purchaser of the note against the indorser, although the former had express notice of the understanding. *Parker v. Sutton*, S. Ct. N. C., March 18, 1889.

Alteration by the payee of an accommodation note for \$50 by inserting before the word "fifty" the words "five hundred and," the body of the note being entirely in the payee's handwriting, does not render the maker liable to a holder for value for the raised amount, although upon signing he had left a blank space sufficient to admit the subsequent insertion of the fraudulent words. *Burrows v. Klunk*, Ct. App. Md., March 27, 1889.

Alteration of note by the maker, by substituting a different amount, date and rate of interest, without the consent of the indorser, releases the latter from all liability, and the note will not be reformed by restoring it to its original state, for the purpose of holding the indorser. *Ruby v. Talbott*, S. Ct. N. M., Feb, 1889.

"Credit the drawer," written on the face of a note by an indorsee, implies no promise nor undertaking on his part, but the words are merely a direction to all persons to whom the note may be presented, to treat with the maker as the owner, notwithstanding the apparent title of the indorsee. *Temple v. Baker*, S. Ct. Pa., April 29, 1889.

Indorsement before maturity of a promissory note payable to order, is necessary, to clothe the transferee with the rights of an innocent holder for value, and to prevent the maker from setting up equities between himself and the payee in defence to such note. *Calvin v. Sterrit*, S. C. Kan., March 9, 1889.

Indorsement in blank and delivery of note to a collector for a firm to whom the payee was indebted, may be shown by parol to have been a transaction in which such collector was to act as agent for the payee to get the note discounted and then apply a portion of the proceeds in payment of the debt due his firm, and if, instead of so doing, he transferred the note to the firm, the latter acquired no interest in it. *Avery v. Miller*, S. Ct. Ala., April 16, 1889.

Indorser, who obtains possession of a note after indorsing it, is relegated to his original position and cannot hold subsequent indorsers upon the note, who could look to him again, nor can a purchaser of the note from him hold such indorsers. *Adrian v. McCuskill*, S. Ct. N. C., March 18, 1889.

Joint maker of a note payable "to the order of myself" may be shown by parol evidence to have been intended as sole payee, to the exclusion of his co-maker. *Jenkins v. Bass*, Ct. App. Ky., March 23, 1889.

BILLS OF LADING.

Station agent, having authority to sign bills of lading, by collusion with a pretended shipper, issued a bill of goods which were not delivered for transportation and had no existence, and the shipper negotiated the bill for value to a third person, who was ignorant of the facts; the railroad company was not liable upon the bill to the latter, the fraud of the agent being outside the scope of his employment, which was only to issue bills for property delivered. *Friedlander v. Texas & P. R'y Co.*, S. Ct. U. S., April 15, 1889.

CANALS.

Injury from escaping water was sufficiently shown, in an action against a canal company for damages, when there was evidence that, when the basin was high, water flowed into the flooded premises, and, when low, it did not; that the swell of the water caused by a passing boat was followed by an increased flow; and that the water first appeared in the premises about the time that an old wall of the canal basin fell in, and continued until the cellar was drained by a new sewer. *Delaware & H. Canal Co. v. Goldstein*, S. Ct. Pa., April 8, 1889.

CHATTEL MORTGAGE.

Lien of livery stable keeper on horse is subject to a recorded chattel mortgage, where the horse is placed in the stable after the making of the mortgage, without the knowledge of the mortgagee, though the stable-keeper had no notice in fact of the mortgage. *McGhee v. Edwards*, S. Ct. Tenn., April 16, 1889.

CONSTITUTIONAL LAW.

Collateral inheritance tax, imposed by State statute upon the value of property passing by will or the intestate laws to any person not within certain degrees of consanguinity to the decedent, is not in conflict with the Fourteenth Amendment to the Constitution of the United States. *Wallace v. Myers*, U. S. C. Ct., S. D. N. Y., March 28, 1889.

Statute imposing absolute liability upon a corporation for injuries done to property in the prosecution of its lawful business, without negligence on its part, when, under the general law of the land, no one else is so liable, does not provide "due process of law," and is void. *Cottrel v. Union Pacific Ry. Co.*, S. Ct. Id., March 18, 1889.

Statutory prohibition, forbidding "any agent traveling with one or more horses" to "sell any lightning rod, sewing machine, or organ, or other musical instrument, without a State license," is not unconstitutional, as applied to such agents selling sewing machines manufactured outside of the State. *State v. Richards*, S. Ct. App. W. Va., March 7, 1889.

Title of statute was "An Act fixing the time for the opening and closing of saloons and gaming houses;" such statute is not repugnant to a constitutional provision that each act of the legislature "shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title." *Ex parte Livingston*, S. Ct. Nev., April 13, 1889.

CONTRACTS.

Agreement by barber, in consideration of another barber furnishing him with everything necessary to conduct a barber-shop in a certain town, to transfer to the former his own patronage, and not to work for any one else or open a shop for himself in such town at any time, the profits of the business to be equally divided between the two, is unreasonable and will not be enforced in equity. *Carroll v. Giles*, S. Ct. S. C., March 23, 1889.

Commercial fertilizers were ordered by a farmer, by letter written in Georgia, to be sent to him from South Carolina by a dealer resident in that State; the goods were shipped by railroad, according to order, from South Carolina to Georgia, and notes for the price were made in Georgia and mailed back to South Carolina; the laws of Georgia in relation to the inspection of fertilizers had no application to the transaction, the contract of sale having been consummated in South Carolina. *Atlantic Phosphate Co. v. Ely*, S. Ct. Ga., March 18, 1889.

Competing firms may agree not to handle certain goods in competition with each other in a specified district, and such an agreement will be enforced in equity ; but where members of one of such firms, and others, form a corporation for carrying on the same general business, and after a time such corporation announces its intention to handle the same goods that were formerly sold by the firm, and in the district where the firm had agreed not to sell, the corporation will not be enjoined from selling such goods, unless it be shown that it was fraudulently created with intent on the part of the stockholders to evade their obligations as individuals. *Moore & Handley Hardware Co. v. Towers Hardware Co.*, S. Ct. Ala., April 30, 1889.

Machinery of a certain description and quality was to be furnished, set up and put in operation in the mill of the purchaser ; if such machinery, when put in, does not work in a satisfactory manner, the mill owner is not compelled, in order to avoid payment of the entire contract price, or to recover damages for breach of contract, to take out the machinery, but the measure of damages is the reasonable cost of altering the construction and setting of the machinery, so as to make it conform to the contract. *Stillwell & Bierce Mfg. Co. v. Phelps*, S. Ct. U. S., April 15, 1889.

CORPORATIONS.

Deed to corporation was signed and acknowledged by the grantor before the charter had been granted, but after the corporators had signed an agreement to become a corporation, and was placed in the hands of a third party to hold until the charter should be obtained, and then to deliver to the proper officer, and such delivery was subsequently made ; the deed operated as a valid conveyance to the corporation from the date of its delivery. *Spring Garden Bank v. Hulings Lumber Co.*, S. Ct. App. W. Va., March 7, 1889.

Judgment against corporation is conclusive upon a stockholder in a suit to enforce the collection of such judgment out of unpaid instalments upon stock. *Powell v. Oregonian Ry. Co.*, U. S. C. Ct., D. Or., March 18, 1889.

CRIMINAL LAW.

Burglary is constituted by breaking into a cellar under a dwelling house, having no internal communication with the house. *Mitchell v. Commonwealth*, Ct. App. Ky., March 12, 1889.

Embezzlement of letter by a post-office employé is constituted, although the letter embezzled was a decoy, addressed to a fictitious person and place, was made up so as to attract attention and indicate that it contained money, and was not intended to be delivered. *U. S. v. Wight*, U. S. D. Ct., E. D. Mich., March 10, 1889.

Former jeopardy may be pleaded in defence upon a second trial of a prosecution for bigamy, where, after the accused had been placed on trial the first time and part of the evidence for the Commonwealth had been received, the Court of its own motion, the

accused neither consenting nor objecting, but remaining silent, dismissed the jury, because of an immaterial error in the indictment. *Robinson v. Commonwealth*, Ct. App. Ky., March 23, 1889.

Juror is competent to serve on a capital case, who has formed an opinion as to the guilt of the accused from what he has read in the newspapers, but who says that he can render a verdict according to the evidence, uninfluenced by his previous opinion. *Rissolo v. Commonwealth*, S. Ct. Pa., April 29, 1889.

DEED.

Delivery in escrow to a third person was made, the deed to be held until the grantee should have paid a specified debt; the deed was delivered, however, to the grantee before the debt was fully paid, but payment of the balance was subsequently made; the delivery was operative and the deed valid from the time of the last payment. *Connell v. Connell*, S. Ct. App. W. Va., March 12, 1889.

Satisfactory proof of fraud is all that is required in an action to cancel a deed alleged to have been obtained by false and fraudulent representations, and it is error for the Court to charge that a jury must be "satisfied beyond all reasonable question" that fraudulent representations were made, in order to set aside such deed. *Harding v. Long*, S. Ct. N. C., April 9, 1889.

Wrongful destruction of an unregistered deed by the grantor, who has regained possession of it after delivery, does not divest the title of the grantee, who may compel a re-execution of the deed; but the grantee cannot waive the tort and sue upon an implied promise to restore the consideration. *Edwards v. Dickenson*, S. Ct. N. C., April 15, 1889.

DOWER.

Fraudulent conveyance, made by husband and wife, was set aside upon application of the creditors of the former; thereupon the wife's right of dower in the estate conveyed was revived and restored to her. *Bohannon v. Combs*, S. Ct. Mo., March 18, 1889.

Merger of dower right takes place, when a married woman acquires, during coverture, the fee in her husband's lands, and her subsequent conveyance to a third person passes the title free from the incumbrance of her dower. *Youmans v. Wagener*, S. Ct. S. C., March 7, 1889.

EASEMENTS.

Owner of pasture which is subject to the easement of a ditch for the drainage of neighboring lands, is not liable for damage done to the ditch by his cattle in crossing over it and feeding on its banks; the burden of keeping the ditch in repair rests upon the owner of the easement. *Durfee v. Garvey*, S. Ct. Cal., March 30, 1889.

EMINENT DOMAIN.

Non-resident owner of land is bound to take notice of a published advertisement of the proposed taking of land for a railroad,

and of a meeting of commissioners to lay off the route and assess damages; such publication is "due process of law," and it is his duty to take measures to be represented when his property is called into requisition. *Huling v. Kaw Valley R'y & Imp. Co.*, S. Ct. U. S., April 22, 1889.

EQUITY.

Injunction will be granted to prevent the erection of a fence along the side of an alley-way, adjoining the complainant's premises, the effect of which would be to entirely close the windows of her house, excluding both light and air and rendering the house unfit for habitation. *Sankey v. St. Mary's Female Academy*, S. Ct. Mont., Feb. 2, 1889.

ERROR.

Trial by consent of parties in the Circuit Court, before the judge at chambers, under an order providing that the cause should be so tried, and that "if it shall appear to the judge upon such trial that there are questions of fact arising upon the issues therein, of such a character that the judge would submit them to the jury, if one were present," such questions should be submitted to a jury at the next term, was neither a trial by jury nor a trial by the court, but was merely a trial by the judge as referee, and the rulings of the judge at such trial cannot be reviewed by the Supreme Court. *Town of Andes v. Slauson*, S. Ct. U. S., April 15, 1889.

EVIDENCE.

Admissions by conductor of railroad train that an accident was caused by his negligence, made more than ten minutes after the accident and after the train had left the place where it occurred, are not admissible in evidence as part of the *res gestae*. *Chesapeake & O. Ry. Co. v. Reeves*, Ct. App. Ky., April 25, 1889.

Physical examination of one suing for personal injuries, by physicians selected by the person sued and at the charge of the latter, may be compelled by the trial court, which has full discretionary powers in the premises. *Richmond & D. R. R. Co. v. Childress*, S. Ct. Ga., April 13, 1889.

FIRE INSURANCE.

Condition precedent to recovery for loss by fire, under the terms of a policy, was the production of "the certificate under seal of the magistrate or notary public living nearest the place of fire" as to the amount of loss, etc.; the production of the certificate of such magistrate, which stated some of the facts required and that he was not competent to state others, and also the certificate of another magistrate who did not live as near as the first, but whose office was nearer, stating all the facts required, is a sufficient compliance with the condition. *Agricultural Ins. Co. v. Bemiller*, Ct. App. Md., March 26, 1889.

Keeping set of books, showing a record of all business transacted, was required by the covenants of a policy which also provided that the books should be kept locked in a fire-proof safe at night and at all times when the assured's store was not actually open for business, and that the books should be produced in case of loss, otherwise the policy would be void; this covenant did not require the books to be kept in the safe from sunset to sunrise, but only from the time that the business of the day was ended and the store closed for the night. *Jones v. Southern Ins. Co.*, U. S. C. Ct., E. D. Ark., Feb. 3, 1889.

Premium note was given by the assured under a policy which provided that, if the note should not be paid at maturity, the policy should become void, and so remain until payment was made, when it should be revived; after a default, part payment of the note would not revive the policy, and the insurer would not be liable for a loss occurring before the total amount of the note had been paid. *Curtin v. Phoenix Ins. Co.*, S. Ct. Cal., April 19, 1889.

Warranty by the assured that he has not omitted to state any information material to the risk, coupled with a provision in the policy, declaring that it shall be void, unless consent is indorsed thereon, if the assured is not the sole and unconditional owner of the insured property, or if his interest, whether as owner, trustee, agent, mortgagee, lessee, etc., or otherwise, is not truly stated, renders such policy void, if the property insured is actually subject to an undisclosed mortgage or is held by the assured under a conditional sale. *Westchester Fire Ins. Co. of N. Y. v. Weaver*, Ct. App. Md., April 16, 1889.

HUSBAND AND WIFE.

Power of attorney may be given by wife to husband to convey her inchoate interest in his real estate. *Munger v. Balldridge*, S. Ct. Kan., March 9, 1889.

JURISDICTION.

Embezzlement of funds of national bank by an officer is within the exclusive jurisdiction of the Federal courts. *U. S. v. Buskey*, U. S. C. Ct., E. D. Va., Jan. 25, 1889.

Federal courts, having once acquired jurisdiction by reason of diverse citizenship, do not lose such jurisdiction by a subsequent transfer of the cause of action, by which the controversy becomes one between citizens of the same State. *Jarboe v. Templer*, U. S. C. Ct., D. Kan., March 18, 1889.

Perjury committed before a notary public in the taking of testimony in a contest for a seat in the House of Representatives of the United States, is within the exclusive jurisdiction of the Federal courts. *In re Lovey*, U. S. C. Ct., E. D. Va., Feb. 19, 1889.

LAND PATENTS.

Stone quarry may be located and patented as a placer claim under the provisions of Revised Statutes of the United States, Sec. 2329, which apply to "claims usually called 'placers,' including all forms of deposit, excepting veins of quartz or other rock in place," and the owner of a placer claim is entitled to all mineral deposits found therein. *Freezer v. Sweeney*, S. Ct. Mont., Feb. 2, 1889.

LIMITATION.

Moneys received for investment are subject to the running of the statute, and, if there is such a trust relation as to avoid the bar, the remedy is in equity, not by an action of *assumpsit*. *Sanford v. Lancaster*, S. Jud. Ct. Me., April 8, 1889.

LIQUOR LAWS.

Incorporated association purchased beer outside of the State, brought it into the State, and then sold chips to its members, each chip representing a glass of beer, which was furnished by the association upon surrender of the chips and was drunk as a beverage by the purchaser, neither the association nor any of its members having a permit to sell intoxicating liquors; the member who sold the chips, the member who delivered the beer upon the return of the chips, and the president of the association, who was present and knew what was done, were all liable to prosecution, conviction and punishment for selling intoxicating liquor in violation of law. *State v. Horacek*, S. Ct. Kan., March 9, 1889.

Selling to minor of intoxicating liquors on the order of and for delivery to his father, the son being simply a messenger for the father, will not sustain a conviction under a statute prohibiting the sale or gift of intoxicants to minors. *State v. Walker*, S. Ct. N. C., May 6, 1889.

MARRIED WOMEN.

Passive acquiescence by a married woman in a deed executed by herself and husband, while she was an infant and covert, will not, however long continued, amount to ratification, while coverture still exists, but, to annul such a deed, she must pay the grantee, her former guardian, for necessities supplied her during minority, which constituted part of the consideration for the deed; she will not, however, be required to refund money paid her husband, also as part consideration, but which never came into her hands. *Stull v. Harris*, S. Ct. Ark., March 16, 1889.

MASTER AND SERVANT.

Rude and reprehensible conduct by the overseer of a plantation towards persons who are sent by the owner to inspect the property, by which conduct the interests of the latter are jeopardized, is sufficient cause for the discharge of the overseer before the expiration of the term of his employment. *Lalande v. Aldrich*, S. Ct. La., March 6, 1889.

NEGLIGENCE.

Concurrent negligence of a carrier and a third person, by which a passenger of the former is injured, does not relieve the latter from liability to the person injured, the negligence of the carrier not being imputable to its passenger. *New York P. & N. R. R. Co. v. Cooper*, S. Ct. App. Va., April, 1889.

PARTNERSHIP.

Good will of an insurance agency business does not belong to either partner exclusively after an unconditional dissolution, and if one of the former partners continues to carry on the business at the firm office, he cannot be compelled to account to his co-partner for the value of the good-will. *Rice v. Angell*, S. Ct. Tex., March 19, 1889.

RAILROADS.

Brakeman on a railroad train may recover for injuries resulting from an accident caused by a bull on the railroad track, even though he knew that the engine was without a cow-catcher and that the fences along the track were defective. *Magee v. North Pacific C. R. R. Co.*, S. Ct. Cal., March 21, 1889.

Crossing highway on trestle does not exempt a railroad company from the duty of giving warning of the approach of its trains to such crossing. *Rupard v. Chesapeake & O. R. R. Co.*, Ct. App. Ky., Feb. 21, 1889.

No recovery can be had for the death of a person who was killed while walking upon a railroad track, where he had no right to be, although the engineer, who could have seen him at a distance of two hundred yards, did not blow the whistle nor give any warning of the approach of the train. *Barker v. Hannibal & St. J. R. R. Co.*, S. Ct. Mo., March 18, 1889.

RECEIVERS.

Claim against railroad company, which has been placed in the hands of a receiver, for the value of goods of a consignee lost by fire while in possession of the company and before the receivership, is not entitled to priority over the claims of bondholders. *Easton v. Houston & T. C. Ry. Co.*, U. S. C. Ct., E. D. Tex., March 15, 1889.

RELEASE.

Settlement of claim for damages by one who has been injured in a collision between two cars of different railway companies, by which he accepts a certain sum in full of all claim for his injuries against one of the companies, and in consequence of which he executes a release, in which he agrees to prosecute his claim against the other company, reimbursing the former company out of the amount to be recovered, will constitute a bar to the second action, the cause of action being thereby satisfied. *Seither v. Philadelphia Traction Co.*, S. Ct. Pa., April 8, 1889.

REMOVAL OF CAUSES.

Action by shore inspector to recover the penalty imposed by a State statute for depositing prohibited materials in the waters of a bay and harbor within the State, which penalty, when recovered, goes into the State treasury, cannot be removed to the Federal Courts on the ground of diverse citizenship, both for the reason that it is in effect an action by the State, and because it is in its nature penal, to enforce a police regulation, and not a suit "of a civil nature, at law or in equity." *Ferguson v. Ross*, U. S. C. Ct., E. D. N. Y., March 20, 1889.

Corporation created under the laws of Kentucky, being sued in a Texas Court, filed its petition for removal to the Federal Court, alleging that the plaintiff was a citizen of Texas and the defendant a citizen of Kentucky, with the necessary allegations as to the amount in controversy and a bond with the requisite security; the facts alleged being true and the bond sufficient, the State Court had no power to proceed further with the cause, and the fact that the corporation did business and had an office and agents in Texas did not deprive it of the right to a trial in the Federal Court. *Southern Pacific Co. v. Harrison*, S. Ct. Tex., Feb. 26, 1889.

Joint cause of action against a resident of the district and a non-resident, cannot be removed by the latter to the Federal Courts, even though the resident has not been served with process. *Patchin v. Hunter*, U. S. C. Ct., E. D. Wis., March 19, 1889.

Local prejudice is not a sufficient ground for removal of a case to the Federal Courts, where such prejudice is confined mainly, if not entirely, to a single county, and there is a State statute allowing the removal of a cause, on the ground of local prejudice, to some other court of competent jurisdiction in some other convenient county. *Robison v. Hardy*, U. S. C. Ct., N. D. Ill., March 18, 1889.

State Court cannot refuse to allow the removal to the Federal Courts of a suit on foreign attachment, where the defendant files a petition alleging that the amount involved is sufficient to give jurisdiction, and that the plaintiffs are citizens of Georgia, while the petitioner is a citizen of England, and the record, down to the time of filing the petition, does not show the residence of the parties, nor the amount involved, to be otherwise than as alleged in the petition; and if any issue of fact is made on the petition it must be determined in the Federal Court. *Horan v. Strachan*, S. Ct. Ga., March 25, 1889.

REPLEVIN.

Defendant in attachment suit, whose goods are seized by an officer in obedience to the writ, cannot maintain replevin against the officer for the goods so taken into legal custody. *Hawk v. Lepple*, S. Ct. N. J., March 25, 1889.

REVENUE LAWS.

Action for a forfeiture or penalty under the United States revenue laws, is abated by the death of the defendant, and such action is not affected by the laws of the State where the cause of action arose. *U. S. v. De Goer*, U. S. D. Ct., S. D. N. Y., Feb. 21, 1889.

SLANDER.

"*Prostitute*," when used of a married woman, imputes the crime of adultery, and is actionable *per se*. *Davis v. Sladden*, S. Ct. Or., March 14, 1889.

Words spoken of butcher, charging that he slaughtered "condemned and diseased cattle" and sold the meat, are actionable *per se*. *Blumhardt v. Rohr*, Ct. App. Md., March 26, 1889.

STATUTE OF FRAUDS.

Contract to sell stock at the end of three years, with an option to the purchaser to call it at any time, is not within the prohibition of a statute, which denies the right of action on any agreement "not to be performed within a year," "unless it be in writing." *Seddon v. Rosenbaum*, S. Ct. App. Va., March 28, 1889.

Telegrams, by an agent of the owner of town lots to the owner that he was offered a certain sum for the "balance of the M. town property" on certain terms mentioned, by the owner to his agent, accepting the offer for the "M. property," and by the agent to the purchaser, communicating the owner's reply, do not constitute such a memorandum in writing as will take the contract out of the statute. *Breckinridge v. Crocker*, S. Ct. Cal., March 29, 1889.

SUNDAY LAWS.

Judgment entered on Sunday is void at common law. *City of Parsons v. Lindsay*, S. Ct. Kan., April 5, 1889.

Right of trial by jury does not extend to the petty offence of laboring on Sunday, punishable by a small fine and cognizable by a justice of the peace. *Ex parte Marx*, S. Ct. App. Va., April 18, 1889.

TAXATION.

Collateral inheritance tax may be imposed by a State upon the value of United States bonds; such tax is not upon the bonds themselves, but upon the privilege of acquiring property by inheritance. *Wallace v. Myers*, U. S. C. Ct., S. D. N. Y., March 28, 1889.

TELEGRAPHS.

Mental anguish is a proper element of damage in an action for breach of contract to transmit money by telegraph, where such anguish is a direct and natural result of the failure to perform the contract and the telegraph company was informed of the circumstances rendering prompt performance of more than ordinary importance. *Western Union Tel. Co. v. Simpson*, S. Ct. Tex., March 26, 1889.

Receiver of telegram may maintain an action against the telegraph company for negligence in its delivery. *Western Union Tel. Co. v. Longwill*, S. Ct. N. M., March 21, 1889.

Stipulation in the contract of a telegraph company that it will not be liable for damages on account of negligence in the delivery of a telegram, unless a claim in writing is presented within sixty days from the receipt of the message, is against public policy and void. *Id.*

TRUSTS.

Resulting trust does not arise out of an agreement between husband and wife, by which the former takes the title to land in his own name, paying part of the purchase money out of his own funds, and agrees to hold it for his wife's benefit, she subsequently paying the balance of the price. *Zeller v. Light*, S. Ct. Pa., April 8, 1889.

WATER-RIGHTS.

Private corporation, organized for the purpose of supplying the inhabitants of a borough with water from an adjacent stream, will be restrained from taking such quantity of water as will render the supply insufficient for the purposes of another borough situated lower down the stream, which latter borough, in the exercise of rights conferred by statute, is maintaining water-works connected with the same stream. *Haupt's Appeal*, S. Ct. Pa., April 8, 1889.

WILLS.

Bequest of money in trust for the testator's daughter for life, "and after her death" to be equally divided among "her surviving children and the issue of such as may be dead, such issue taking *per stirpes*, and not *per capita*," vests the remainders in the children referred to, or their issue, upon their surviving, not the life-tenant, but the testator, and therefore the administrator of one of such children, who died after the testator and before the life-tenant, is entitled to share in the distribution of the fund. *Jameson v. Major*, S. Ct. App. Va., April 18, 1889.

Devise, by will made in 1881, was to the "Board of Trustees for the Protestant Episcopal Church in the Diocese of North Carolina;" at that time the Diocese embraced the whole State, but in 1883 was divided by mutual consent into two dioceses, North Carolina and East Carolina; the testator died in 1885; the trustees of each diocese were entitled to receive one-half the property devised. *Diocese of East Carolina v. Diocese of North Carolina*, S. Ct. N. C., March 18, 1889.

Rule in Shelley's Case applies to leasehold as well as to freehold estates. *Hughes v. Nicklas*, Ct. App. Md., March 27, 1889.

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STATUTORY LIABILITY FOR CAUSING DEATH.

(Continued from July number.)

In Kentucky, the distinction between the two kinds of statutes, and the true significance of the inquiry, whether the death is immediate or otherwise, are even more plainly brought out, if possible, in certain cases which evidently escaped the notice of Judge Cooley.

In Kentucky they have (or did have when the cases about to be referred to arose) two acts: one similar to Lord Campbell's Act, giving a remedy by action, not, as in Massachusetts, by indictment, but requiring, except in certain cases, the neglect causing the death, to be willful; the other providing in general terms for the survival of rights of action for injuries to the person, subject to certain exceptions not material here.

In *Louisville and Portland Canal Co. v. Murphy* (1872), 9 Bush. (Ky.) 522, explained in 11 Id. 384, and *Hansford Admx. v. Payne* (1875), 11 Id. 380, actions were brought by the personal representatives of the deceased, and were, in each case, held not maintainable under the former act, because the neglect alleged or shown was not willful; and it therefore became material to consider whether the action could be maintained under the latter act. In the former case the death resulted from drowning, and it was held that no cause of action vested in the deceased, and therefore none survived to his representatives. The death was evidently considered as immediate:

see remark of the Court, in 11 Bush. 384, to that effect. In the latter case the death was by poisoning, the defendant, a druggist, having put up poison by mistake for a harmless drug, and the Court held that, while there could be no recovery under the act in question, when the death was practically instantaneous or immediate, there could be a recovery in the case at bar, as an appreciable interval of suffering elapsed between the infliction of the injury and the death. The measure of recovery was said to be what the intestate would have been entitled to if he had obtained relief at the moment of death.

In New York and Texas it has been held, under statutes not different in any essential particular from Lord Campbell's Act, that an action is maintainable in case of instant death: *Brown v. Buffalo, &c., R. R. Co.* (1860), 22 N. Y. 191; *International & G. N. R. R. Co. v. Kindred* (1882), 57 Tex. 491. The contrary contention does not seem to have been considered worthy of much consideration by the Court.

In Connecticut, Tennessee and Iowa cases have arisen under statutes having a peculiar phraseology, and which raised an arguable question, whether an action was maintainable in case of instant death. Under each statute the action was held maintainable in such case. In Connecticut, *Murphy v. N. Y. & N. H. R. R. Co.* (1861), 30 Conn. 184, the statute (Rev. Stat. tit. 1. § 83) provided that—

“Actions for injuries to the person, whether the same do or do not result in death, shall survive to the executor or administrator.”

The peculiarity of this statute is the introduction of the clause, “whether the same do or do not result in death.” Giving these words their natural import, they add nothing to the meaning of the enactment. They must have been inserted with some purpose, however, and it seems probable that the purpose was to give a right of action to the representative in cases generally where an injury produces death, a right of action being (rightly or wrongly) conceived by the framers of the act as vesting in the injured person in all cases (whether the death is immediate or otherwise), so as to be able to survive to his representatives.

There is, therefore, no fault to find with the construction

given to the act by the Court. In the opinion in this case, however, there appears to be the original of Judge Cooley's comment on the Massachusetts case of *Kearney v. Boston & Worcester R. R. Co.* (1851), 9 Cush. (Mass.) 108. The Court apparently considered the Massachusetts decision to be an obstacle in the way of reaching the conclusion which they desired to reach, and remarked, at once distinguishing and disparaging it, that it turned upon the peculiar phraseology of the Massachusetts statute, and that the construction given was rather nice and technical. The peculiarity, however, is in the Connecticut, not in the Massachusetts enactment, and the construction applied in the Massachusetts case is a very plain and intelligible one.

The Tennessee statute was the one previously quoted, when we were considering the question of the measure of damages. The case of *Nashville & C. R. R. Co. v. Prince* (1871), 2 Heisk. (Tenn.) 580, before cited, held that it applied to cases of instant death, overruling on that point the case of *Louisville & Nashville R. R. Co. v. Burke* (1868), 6 Cold. 45. This statute, too, manifests an intention to give a right of action for all cases where death is caused by a wrongful act, and criticism, if any, would be directed, not towards the construction given by the court carrying out that intention, but towards the questionable assumption involved in the form of the enactment; that a right of action always vests in the injured person, and may therefore survive to his personal representatives.

In Iowa, the original enactment said that "whenever a wrongful act produces death, the perpetrator is civilly liable for the injury." In a revision of the statutes subsequently made, these words were omitted, but all causes of action were made to survive, provision was made as to the disposition of damages recovered, when a wrongful act produces death, and it was provided that the civil remedy is not merged in the public offense. It was evidently intended to retain the right of action originally given, and a construction of the revision, carrying out this intent is to be approved, however bunglingly the intention was expressed. The opinion in *Connors v. Burlington C. R. & N. Ry. Co.* (1888), 74 Iowa 383, followed in *Worden v. Humeston & S. R. Co.* (1887), 72 Iowa

201, sustaining an action in a case of instant death, goes upon the ground that the reasons for the common law rule, forbidding the maintenance of an action for causing death, were, that the civil remedy is merged in the felony, that a right of action for tort to the person, does not survive, and that, both reasons being removed by the statute, the rule should no longer be maintained.

The position of the Iowa Court on this subject is somewhat like the position of those who seek to identify a statute abolishing the common law doctrine of non-survival of actions for personal torts, with an enactment like Lord Campbell's Act, though apparently not precisely the same. If the reasoning of the Court were sound, it would perhaps afford some support to the latter position. But we cannot commend the reasoning or conclusion. The doctrines assigned as the foundation for the common law rule, do not fully account for it; and at all events, the repeal of so well settled a rule should not be considered as effected indirectly by repealing certain doctrines on which it is supposed to rest.

The decision of the New Jersey Court in a recent case (*Grasso v. Delaware, L. & W. R. Co.* (1888), 50 N. J. L. 317), substantially supports the latter idea. Counsel claimed that the common law rule depended solely on the notion that every homicide was a felony, which merged the civil remedy, and that, as the latter doctrine does not hold in this country at the present day, the rule itself should be discarded. The Court, doubting whether the reason alleged was the real and only reason for the rule, said that—

“The rule has become so solidified, that whatever its original reason was, and however such reason may have ceased to exist, it cannot be judicially disregarded or annulled, but, if injurious, its further modification must be sought from legislative action.”

The question as to the extra-territorial operation of one of these statutes may be considered to involve the question, whether the right of action given is a new right of action or a continuance of one existing at common law.

In the leading case of *Whitford v. Panama R. R. Co.*, 23 N. Y. 465, decided in 1861, it was held that an action was not maintainable in New York, under the statute of that State, for

a death caused by the negligence of the defendant on the Isthmus of Panama, although the defendant was a corporation incorporated under the laws of New York. The decision is put expressly upon the ground that the statute gives a new cause of action.

"The statute," said DENIO, J., in giving his opinion, "does not profess to revive his [the deceased's] cause of action in favor of the executor or administrator. The compensation for bodily injuries remains intact, but a new grievance of a distinct nature, namely, the deprivation suffered by the wife and children, or other relatives, of their natural support and protection, arises upon his death, and is made by the statute the subject of a new cause of action," etc.

Chief Judge COMSTOCK and HORT, J., dissented, and the opinion of the former in another case, to which we shall presently refer, is appended to the report of this case, as showing the grounds of his dissent.

A case arose in Vermont a few years subsequently, in 1865, (*Needham v. Grand Trunk R'y Co.*, 38 Vt. 294.) in which the catastrophe causing the death occurred in New Hampshire; but the death occurred in Vermont, and the decedent was a citizen of Vermont. In Vermont, it seems, there were two statutes: one abrogating the common law rule of non-survival of actions for personal torts; the other, a substantial reproduction of Lord Campbell's act. In New Hampshire there were enactments of neither kind. In considering the question of liability, the Court inquired first, whether, under the Vermont statutes, two actions were maintainable in case of death caused by negligence, and, secondly, if so, whether either statute had extra-territorial operation so as to sustain the action in the case before the Court. The first question was answered in the affirmative, but the second in the negative, and the action consequently failed. In the case of *Whitford v. Panama R. R. Co.* (1861), 23 N. Y. 465, the action was brought under a statute like Lord Campbell's Act, and it was not material to consider whether a mere survival act would have extra-territorial operation. Here, however, it became material to pass upon that question, as two descriptions of acts were before the Court. The first question considered by the Vermont Court, as to the maintenance of separate actions under each of the two statutes, was merely preliminary; and, considering the position taken

by the Court on the question of extra-territorial operation, was not strictly necessary to the disposition of the case. It was, however, carefully considered, and the same theory of Lord Campbell's Act was propounded as in the New York case, that it gives a new cause of action. In the course of the opinion, the Court makes the following plain statement of its position on this question :

"The intent of the 15th, 16th and 17th sections [substantially like Lord Campbell's Act] was to make the damage or pecuniary injury resulting from such death, to the widow and next of kin, the subject of a new cause of action and right of recovery, wholly distinct from the consequences of the wrong to the injured party and wholly distinct from his claim for damages resulting from such injury. The provisions of the last mentioned sections have introduced principles wholly unknown to the common law, or to any previous statute of this State, namely, that the value of a man's life to his wife and next of kin constitutes a part of his estate, to be administered by his personal representative, and that the whole proceeds of the recovery for such loss shall go to his widow or surviving relatives."

When the death is caused in one State and the action is brought in another, it is held, according to the preponderance of authority, that the action is maintainable, if both States have statutes substantially alike, giving a right of action. This was held in *Leonard v. Columbia S. N. Co.* (1881), 84 N. Y. 48, [followed in *Debevoise v. N. Y., L. E. & W. R. R. Co.* (1885), 98 Id. 379], among others, subsequent to *Whitford v. Panama R. R. Co.* (1861), 23 N. Y. 465.

[Cooley on Torts, 2d ed., *266, states this to be the rule also in Iowa: *Morris v. C. R. I. & P. R. R. Co.* (1885), 65 Iowa 727; the recovery is not on the Iowa statute, but that of the place of the injury: *Hyde v. W. St. L. & P. R. R. Co.* (1883), 61 Id. 441.

[And in Mississippi: *Chicago, St. L. & N. O. R. R. Co. v. Doyle* (1883), 60 Miss. 977; *Ill. C. R. R. Co. v. Crudup* (1885), 63 Id. 291. As to the administrator being the proper plaintiff under the foreign statute, the principle of the last citation is not followed in Missouri: *Vawter v. M. P. R. R. Co.* (1884), 84 Mo. 679; but the statutes were "materially different:" HENRY, C. J., *St. Joseph F. & M. I. Co. v. Leland* (1886), 90 Id. 177, 182.

[And in Indiana: *Burns v. Grand Rapids & I. R. R. Co.* (1887), 113 Ind. 169.

[And in Pennsylvania: *Knight v. W. Jersey R. R. Co.* (1885), 108 Pa. 250.

[And in New York: *supra*. But in *Leonard v. Columbia S. N. Co. supra*, the defendant was a domestic corporation, and the case was so distinguished in *Robinson v. Oceanic S. N. Co.* (1889), 112 N. Y. 315, which EARL, J., said, was a case where the plaintiff's intestate was a non-resident, being a citizen of Massachusetts, the defendant an English corporation, and the cause of action, which was

the negligent killing by a collision on the ocean, but within the jurisdiction of Great Britain, did not arise within the State of New York; "and, therefore, no Court within this State has jurisdiction of the action:" Id. 320, 321.

These cases do not impugn the authority of the Whitford case, in which it does not appear what the law of New Grenada was, but, on the contrary, the question mooted in them rather assumes that the action given by the statutes, is not, or may not be, considered to be a survival of a common law right of action vesting in the deceased.

In a recent case, *Debevoise v. N. Y., L. E. & W. R. R. Co.* (1885), 98 N. Y. 379, the action was held not maintainable where the accident occurred in another State, and it was not shown what the statute of that State was, thus affirming, in effect, the Whitford case.

In the Supreme Court of the United States, the right to recover in one State, under the statutes of another State, in which the death was caused, is maintained (*Dennick v. R. R. Co.* (1880), 103 U. S. 11), upon the broad ground that the action being transitory in its nature, a right thereof given by the statute of the State where the accident occurred can be enforced anywhere. In fact, the two States (New York and New Jersey), in that case, had similar statutes. The action was brought in New York under the New Jersey act.

The question as to the right of action under the statute for a death occurring at sea, has arisen in a number of cases, and, in a case decided in 1879 (*McDonald v. Mallory*, 77 N. Y. 546), while the views expressed in the Whitford case were fully approved, it was held that the action could be maintained, where the vessel on which the death occurred hailed from and was registered in a New York port; on the theory that such a vessel was to be regarded as carrying the law of New York with it. Similarly, *The E. B. Ware, Jr.*, U. S. C. Ct., Dist. La., 1883, 16 Fed. Repr. 255, and 17 Id. 456. To the contrary, *Armstrong v. Beadle*, U. S. C. Ct., Dist. Cal., 1879, 5 Sawyer, 484, SAWYER, J., saying:

"The statute undoubtedly creates a new right of action, and does not merely give a remedy for a right already existing."

[After an exhaustive review of the subject, the United States Supreme Court in *The Harrisburg* (1886), 119 U. S. 199, 213,

found the case did not present this point, Chief Justice WAITE saying—

“ Since, however, it is now established, that, in the courts of the United States, no action at law can be maintained for such a wrong, in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty, from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular, under the maritime law of this country, are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule.

“ This brings us to the second branch of the question, which is, whether, with the statutes of Massachusetts and Pennsylvania, above referred to, in force at the time of the collision, a suit *in rem* could be maintained against the offending vessel, if brought in time. About this we express no opinion, as we are entirely satisfied that this suit was begun too late.”

The question whether a settlement of the claim for damages, made by the injured person in his lifetime, will bar a suit under the statute after his death, arose in this country as early as 1857 (prior to the Whitford case), in the case of *Dibble v. New York & Erie R. R.* (25 Barb. 183), in the Supreme Court of New York. The Court, while admitting the force of the argument upon the other side, “ especially when we consider the nature of the injury which the action was designed to compensate,” held that the settlement was a bar, considering the cause of action in the two cases to be the same, although the measure of damages was different. Said JOHNSON, J., who delivered the opinion—

“ The right of action which he [the decedent] might have enforced, had he survived the injury, upon his death accrues to his personal representatives for the benefit of those entitled to share in his estate. And it is given for the same wrongful act or neglect. This is the essential foundation of the action in either case. The wrong to be redressed is the same in both cases, but the injury flowing from the wrong to be compensated is different. The person injured is compensated for the injury to his person, the others for the injury they sustain from the death of the injured person. If the person injured obtains satisfaction by action, or by voluntary settlement and payment, before death ensues, the wrongful act which caused the injury and all its consequences, past and future, are included, and the whole canceled together, and the liability of the person inflicting the injury ended. If not, the liability continues after, and notwithstanding the death, for the purpose of compensating the widow and next of kin, for the injury resulting to them from the death caused by the wrongful act. This gives but one action for the same injury to the same person. * * * * The object of the statute, as I understand it, was to

continue the cause of action which the person injured had, and which he had not enforced but might have enforced, if death had not ensued, for the benefit of the widow and next of kin, to enable them to obtain their damages resulting from the same primary cause and not to create an entirely new and additional right of action. The plaintiff's construction would give two actions for a single wrongful act and frequently a double compensation for the injury flowing from it, to the same individuals."

This case was appealed to the Court of Appeals and that Court was equally divided in opinion regarding it, although it was three times argued before it. No disposition seems to have been made of the case in the Court of Appeals (see *Littlewood v. Mayor of New York* (1882), 89 N. Y. 24, 29, per RAPALLO, J., and *Schlichting v. Wintgen* (1881), 25 Hun. 626, 629, per DYKMAN, J.), but the opinion of Chief Judge COMSTOCK therein for affirmance, is printed as part of the case of *Whitford v. Panama R. R. Co.*, before referred to (23 N. Y. 484), and maintains the view that the statute is "remedial, not creative," and merely changes the common law rule by which an action for injury to the person does not survive and does not create a new cause of action. In case of instantaneous death, he says the theory is that there is a moment preceding death in which the cause of action vests in the injured person. In 1881 the same question substantially arose again in the Supreme Court of New York, (*Schlichting v. Wintgen*, just cited), the only difference between this case and the Dibble case being that in this an action had been brought and a recovery had therein by the injured person in his lifetime, whereas in the Dibble case, as in the English case of *Read v. Great Eastern Ry Co.* (1868), L. R. 3 Q. B. 555 (before cited, page 387), the settlement appears to have been made out of court. It is always assumed that there is no ground for making any difference between the case of recovery by suit and settlement without suit, and probably there is no tenable ground of distinction. The Court, in consideration of the fact that the Court of Appeals had been equally divided in the Dibble case, felt free to follow their own views, and, adopting the theory of the statute maintained in *Whitford v. Panama R. R. Co.*, held that the prior recovery was no bar to the action. More recently, however, in *Littlewood v. Mayor of New York* (89 N. Y. 24), decided in 1882, the contrary has been held by the Court of

Appeals and this vexed question is thereby settled, for New York at least, in accordance with what we have seen to be the English law upon the point. In coming to this conclusion, however, the Court of Appeals repudiates the theory that the right of action given by the statute is a mere continuation in his representatives of the right of action which the deceased had in his lifetime, and admits that it is a new right of action, taking the position that, irrespective of that question, it was not intended that there should be a recovery by the representative after the deceased had himself recovered damages in his lifetime. The opinion reviews the English cases subsequent to *Read v. Great Eastern R'y*, considered herein, and finds nothing in them inconsistent with that case.

In Kentucky, where, as we have seen, there are two statutes, one providing generally for the survival of rights of action for injury to the person, and the other similar to Lord Campbell's Act, but limiting the remedy in a certain class of cases to instances of *willful* negligence, it is held that the pendency of a suit brought by the administratrix under the former statute to recover damages for the suffering of the intestate prior to his death, is a bar to a subsequent action under the latter statute: *Conner's Adm'x v. Paul* (1876), 12 Bush. (Ky.) 144. This holding had been foreshadowed in the case of *Hansford's Adm'x v. Payne* (previously cited), decided the year before, in which it was objected to allowing a recovery under the survival statute, where the plaintiff failed to make out a case under the other statute, that such a ruling would enable parties to sue and recover under both statutes; but the Court replied that that result would not follow, but that a recovery under either statute would bar a subsequent action under the other. Said the Court in the Conner case :

"The acts causing the death of the party, from either the willful or ordinary negligence of the party charged, constitute but one cause of action, whether the measure of recovery sought is for the suffering of the intestate during his life, or for the willful negligence causing his death. Different degrees of negligence cannot be established from the same acts of the party charged, so as to create different causes of action in favor of the party injured, or the injuries resulting from such negligence so severed as to create distinct causes of action by the same person. The statute has only enlarged the remedy and given to parties a cause of action unknown to the common law. The party entitled to bring the action, either

at common law or under the statute, must make his election; and while the right of recovery under our statute for willful negligence may increase the measure of recovery, such an action is a bar to a cause of action that survived at common law upon the same facts. The acts constituting the wrong being inseparable, a recovery by the administrator for the mental and bodily suffering of the intestate is a bar to any proceeding under the statute, either by the personal representative or the next of kin."

The opinion in a recent Illinois case enforces the view that the right of action given by the statute, giving damages for the benefit of the relatives, is a continuance of the common law right of action belonging to the decedent, and that two recoveries cannot be had: *Holton v. Daly, Adm'x* (1883), 106 Ill. 131.

"The cause of action is plainly the wrongful act, neglect or default causing death, and not merely the death itself. Damages are recoverable, not for the killing, but, as was observed by COMSTOCK, J., in *Dibble v. N. Y. & Erie R. R. Co.*, as quoted by him in his dissent in *Whitford v. Panama R. R. Co.*, 23 N. Y. 486, 'notwithstanding, or in spite of, the death which ensues. The statute recognizes but one cause of suit and that is the wrong done irrespective of its consequences.' * * * A right of action which at common law would have terminated at the death, is continued for the benefit of the wife, husband, etc., and its scope enlarged to embrace the injury resulting from the death. * * * It is not to be presumed it was intended that there should be two causes of action in distinct and different rights by the same party plaintiff for the same wrongful act, neglect or default." (per SCHOLFIELD, J., pp. 137, 140).

The question arising for decision in this case, was as to the right of the administratrix of the plaintiff in an action for personal injuries, to be substituted as plaintiff, after the death of her intestate, pending the action, from the effect of the injuries which were the subject of the action, and to maintain the action for the damages suffered by the intestate, the original plaintiff, up to the time of his death. With the effect and apparently the intention of preventing a double recovery, the Court held that a recovery could not be had by the administratrix (she having been substituted as plaintiff), upon the basis referred to, notwithstanding the fact that there was, in addition to an act like Lord Campbell's Act, a statute making actions for injury to the person survive. The Court reached this result by holding that the statute last named should be confined in its operations, although unqualified in its terms, to cases where the former act did not apply; that is, to cases where the death resulted not from the injury complained of, but from

some other cause. The lower Court had overruled a motion to dismiss, made after the substitution of the administratrix as plaintiff. This ruling, the Supreme Court held, could not be impugned, as it did not then appear of record what the cause of plaintiff's death was; but, it being shown by the evidence on the trial, that the cause of the death was in fact the injuries complained of, the Supreme Court held that the administratrix was in the same position which she would have occupied had she begun the suit originally under the act giving damages for causing death; and that, therefore, instructions allowing the jury to give a verdict upon the basis of the damages sustained by the intestate up to the time of his death, were, although excluding the death itself as an element of damages, erroneous. This case well illustrates the violence which is done to the language of enactments, and the inconsistencies in which the courts become involved in the effort to limit the plaintiff's remedy to a single action. With two laws on the statute-book, either of which might be supposed to supply any deficiencies of the other, one providing as plainly and unqualifiedly as language can, that rights of action for injury to the person shall survive, it would be thought that a recovery could be had, after the death of an injured person, of the same damages which he could have recovered in his lifetime. Yet, in an action originally begun by the injured person in his lifetime, such recovery is denied; and the administratrix is remitted, as her sole remedy, to another suit, in which the rule of damages will exclude the damages suffered by the intestate himself. In one breath, the Court asserts that the act merely continues the common law right of action which the deceased had, and in the next actually reverses the judgment below because the action begun by the decedent in his lifetime was allowed to be revived and continued *as begun*, after his death.

In Kansas, as in Illinois, it has been held that the survival act does not apply to cases where the death results from the wrongful act complained of: *McCarthy v. R. R. Co.* (1877), 18 Kan. 46, but recently Judge BREWER, sitting as United States Circuit Judge for Kansas, has doubted the correctness of the decision of the Kansas Supreme Court: *Hulbert v. Topeka* (1888), 34 Fed. Repr. 510, although he himself was a mem-

ber of the latter Court, when the decision was made, and concurred in the judgment. He now declares himself in favor of the opposite view, although bound to yield to the authority of the decision of the State Court. Referring to the two sections of the Code, § 420, providing for the survival of actions for personal injuries, and § 422, for the recovery of damages for causing death, he says:

“The measure of damages and the basis of recovery under the two sections are entirely distinct. Section 422 gives a new right of action—one not existing before; an action which is not founded on survivorship; an action which takes no account of the wrong done to the decedent, but one which gives to the widow, or next of kin, damages which have been sustained by reason of the wrongful taking away of the life of the deceased.”

In accord with the opinion of Judge BREWER, and opposed to the holding of the Illinois and Kansas Supreme Courts, is a recent decision in Mississippi: *Vicksburg & M. R. Co. v. Phillips* (1887), 64 Miss. 693, in which, under a similar condition of the statute law as exists in Illinois and Kansas, an administratrix, not being one of the relatives entitled to recover damages for a death, was held entitled to sue under the survival act, in a case where the decedent had died from the injury complained of, CAMPBELL, J., said:

“Section 1510 provides for an action to recover for the death of a person, and it is entirely distinct from and independent of an action by the personal representative. They may co-exist but have no connection. * * * It is manifest that the death of Jo Brantley [the intestate], did not destroy the right of action; for had he commenced an action, it would have survived.”

The qualification impliedly annexed to the survival act, by the decisions of the Illinois and Kansas Courts, recalls the decisions of the Maine Court: (*State v. Maine Central R. R. Co.* (1872), 60 Me. 490; *State v. Grand Trunk R'y Co.* (1873), 61 Id. 114), restricting the operation of the other act (the one giving damages for causing death), by supposing it to refer only to cases of instantaneous death; that is, where there would be no room for the operation of the survival act. The Maine decisions accomplish the result aimed at, viz., preventing a double recovery, even more effectually than those of Illinois and Kansas, as they not only render two actions after death impossible, but limit the opportunity for any action after death

for the benefit of the relatives, to cases where there was no opportunity for an action before death.

A Massachusetts decision (*Comm. v. Metropolitan R. R. Co.* (1871), 107 Mass. 236), also stands opposed to the Maine decisions. The Massachusetts case seems to have been rightly decided; the others appear to take an unwarrantable liberty with the text of the law.

The position that an action is maintainable under each statute separately, was maintained with great force of reasoning in the Vermont case of *Needham v. Grand Trunk R'y Co.* (1865), 38 Vt. 294, where the question was considered incidentally. Among other things, it was pointed out in the opinion in that case that one result of holding an action under the act, modeled after Lord Campbell's Act, to bar an action under the survival act, would be to deprive creditors of a decedent, who survived an injury for some time, and finally, perhaps after being impoverished by a long sickness, died from the effects of it, of a fund which would otherwise be applicable to the payment of their claims; as the damages recovered under the former act would go to the widow and next of kin, free from the claims of creditors. This objection is a grave one and is very suggestive. The difficulty lies in the fact that the fund recoverable under one act (supposing that there are two acts, as we have seen to be the case in not a few States), has not the same destination as that recoverable under the other, the one belonging to the family free from the claims of creditors (this is almost invariably provided in acts like Lord Campbell's Act), and the other belonging to the estate generally, and being therefore subject to the claims of creditors in the first instance. If only one action or one settlement is allowable, then the executor, or administrator (in case he alone is authorized to sue), has the power to prefer one class to another; and, if others than the executor or administrator are authorized to sue (as is sometimes done), mere priority of action on the part of the representatives of the one class, will operate to deprive the other class of a just claim. In the Kentucky case of *Conner's Adm'x, v. Paul* (1876), 12 Bush. (Ky.) 144, for example, the course taken by the administratrix in suing under the survival act for damages for the suffering, etc.,

of deceased, prior to the time of his death, might have resulted, and perhaps did result, under the decision of the Court, in depriving the relatives of the compensation to which, under the statute, they were entitled, and which, it would seem, they could not justly be deprived of by any arbitrary act of the administratrix; and, on the other hand, if the administratrix had sued under the other act, the creditors (supposing the estate to be insolvent), would have been deprived of assets to which they were justly entitled. The Court, in the Needham case, said, with good reason, that

“The principle, that a wrong resulting in death, affords, under these statutes, two distinct causes of suit, obviates many difficulties that would arise under a different rule.”

It should be mentioned that in Massachusetts the Supreme Court, in holding the act of 1881, giving a remedy by civil action against carriers and towns for negligently causing loss of life, to be prospective only, and not to apply to past cases, said that the act gave a new remedy, additional to the remedy by indictment: *Kelley v. Boston & Maine R.R. Co.* (1883), 135 Mass. 448.

The Court had previously, and before the passage of the act of 1881, avoided expressing an opinion as to what effect a recovery by the party injured, or his representatives, would have upon the prosecution of an indictment under their statute: *Comm. v. Metropolitan R.R. Co.* (1878), 107 Mass. 236, 237, per COLT, J.

In Pennsylvania there is a statute which expressly makes the right of action conditional upon no action having been brought by the injured person in his lifetime: Act 15 April, 1851, § 19, P. L. 674.

It has been held in *Barley v. Chicago & A. R. R. Co.* (1865), U. S. C. Ct., N. Dist. Ill., 4 Biss. 430, that a recovery by a father for the loss of the services of his minor son, by reason of an injury to the latter which resulted in his death, was no bar to an action by the father, as administrator, to recover, under the statute, for the son's death. This holding is correct, under any theory of the statute, as the father's claim for loss of services of the son is entirely independent of and co-exists with the son's personal claim for damages, and two distinct

actions are maintainable in the son's lifetime. In Iowa, however, a curious condition of the statute law produced a curious result. In addition to a general act, imposing liability for wrongfully causing death, there was an act providing that the father, or mother, might sue for loss of services resulting from an injury to, or the *death* of, a minor child; and, in that state of the law, it was held that a father, suing as administrator under the former act, to recover for causing the death of his minor son, could only recover for the value of his son's life *after* majority, as the latter act covered the time previous to his majority: *Walters v. Chicago, R. I. & P. R. Co.* (1873), 36 Iowa 458.

To summarize the decisions upon the question of the right to maintain two actions for an injury causing death (exclusive of a husband's, or father's, action for loss of service by reason of injury to wife, or child), the cases stand thus: A recovery by an injured person in his lifetime will bar an action by his representatives after his death, according to the decisions in England and New York, where alone the question has arisen. The maintenance of separate actions after the death, for the benefit of the estate, and of the family respectively, under the two species of statutes, viz., the survival act and Lord Campbell's Act, is avoided in certain States, viz., Maine, Illinois and Kansas, by so construing the two statutes that they can not both apply to the same case, a restrictive construction being given to what takes the place of Lord Campbell's Act in Maine, and a restrictive construction being given to the survival act in Illinois and Kansas. The same result is reached in Kentucky, by holding an action under either of the two statutes to preclude the maintenance of an action under the other. The restrictive construction of the one statute, adopted in Maine, is, however, rejected in Massachusetts; and the restrictive construction of the other statute, adopted in Illinois and Kansas, is rejected in Mississippi and condemned upon principle by the United States Circuit Judge for Kansas. The Vermont Court stands committed to the view that separate actions are maintainable under each of the two statutes.

CHARLES R. DARLING.

(To be continued.)

RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

BABBITT v. BUMPUS.

In the absence of a special contract, an attorney is not an insurer of the result of the litigation which he undertakes. He is bound only to ordinary skill, care, intelligence and diligence, and good faith. An error for which he will be liable must be so gross as to render wholly improbable any disagreement among good lawyers as to the manner of the performance of the service in the particular instance.

In an action for his fees the attorney is a competent witness as to the value of his services and may show his knowledge and experience. He may likewise testify as to the charges of other attorneys for like services.

Evidence that the attorneys on the other side charged less than the plaintiff and that their services were of as great or greater value, is irrelevant.

Where, after a settlement procured by the attorney, a second suit is brought against the client through no fault of the attorney, evidence as to the damage sustained by the client by the bringing of the second suit, is inadmissible.

In his charge to the jury, the trial judge said: "An attorney is obliged to do the very best he can. In this case it has been done. * * * I don't think that you are warranted by the testimony in saying that B (the attorney) was in any way negligent." *Held*, error.

Error to the Circuit Court of Wayne County.

S. W. Burroughs for appellant.

Conely, Maybury & Lucking for appellee.

SHERWOOD, C. J., delivered the opinion of the Court, January 18, 1889: This action is brought by plaintiff to recover of the defendant the value of services rendered for her as attorney and counselor-at-law in the prosecution of a suit in the Circuit Court for the County of Washtenaw, in chancery, wherein Isaac N. Bumpus was complainant and Myron M. Bumpus was defendant—a partition case—for the division of eighty acres of land. The plaintiff appeared in the case for defendant and disclaimed, Myron having, before the suit was commenced, quit-claimed his interest in the land to defendant, and nothing further seems to have been done in the case. Also, for services in a suit in the Wayne Circuit Court, in chancery, wherein the defendant and Samuel R. Bumpus were complainants, and Isaac N. Bumpus was defendant, for the purpose of obtaining title to certain lands held by Isaac, who was a son of Mrs. Bumpus. The complainant's bill was dismissed on the hear-

ing, and complainant appealed to this Court and the decree was affirmed, plaintiff being their solicitor therein. See 59 Mich 95. Also, for retainer and services in a suit in the Circuit Court for the County of Washtenaw, in chancery, wherein Isaac N. Bumpus was complainant, and Mrs. Bumpus and her husband were defendants. This suit was to obtain specific performance of a contract. The defendants were beaten on the hearing, and a decree of \$8,000 was rendered against Mrs. Bumpus. From this decree she appealed to this Court, and the decree was reversed, and the complainant's bill was dismissed. See 53 Mich. 346. Also, for services in a partition case, in chancery, in the Washtenaw circuit, wherein Isaac N. Bumpus was complainant, against Mrs. Bumpus and others. This case was subsequently settled. Also, for retainer and services in the case of the People against Myron M. Bumpus, informed against for the crime of murder. It is for retainer and services and disbursements in these cases that the plaintiff makes his claim against the defendant, amounting, as he presents his bill, to the sum of \$2,165.25, and upon which he credits the defendant with the payment of \$1,484.75, and brings his suit for the balance, being \$680.50.

Defendant pleaded the general issue, and gave notice that she would show on the trial, set-off, under the common counts, to the amount of \$1,635.75; and further, that such services, if rendered for the defendant, were so rendered under an agreement that the plaintiff was to have a retainer in each case, when defendant was a party, of \$25, and the further sum of \$25 per day for each day that the plaintiff was actually engaged in Court upon the trial and hearing of said cases, and that the retainers were to be full pay for all other services, and that she has fully performed her said agreement with the plaintiff; that the plaintiff failed and neglected to perform his agreement with her, but negligently did her business, failed to take and perfect appeals when he should have done so, and mismanaged her said business, and so improperly advised her in relation thereto as to unnecessarily cause her to pay and lay out large sums of money, which she should recoup against the plaintiff. Upon the trial of the case the plaintiff recovered a verdict for \$500. The defendant brings error, basing the same

upon the rulings of the Court upon receiving the testimony (all of which appears in the record), as well as upon the charge and refusals to charge.

The plaintiff was sworn in his own behalf as to the value of his services, and the first and second errors assigned are aimed at this testimony. He was a competent witness, under our statute, for that purpose, and like all other witnesses upon that subject, was entitled to show his own experience and knowledge, and give his judgment as to the value of his services, and upon his own theory of the case, which was to the effect that there was no special agreement as to the amount he was to have for his work, but that, when he was inquired of by his client, or by those who were authorized by her to engage his services, as to what he charged, he told them his retainer was \$25, and for services such sums as are stated in his bill, and it was entirely competent for him to testify as to his knowledge of the charges of other attorneys for like services in similar cases. He thereby only gave evidence of his own qualifications to speak of the value of his own services charged for, and this is always proper. And the same may be said of the witness Robinson's testimony, referred to in the eighth assignment of error, relating to the same subject. No error was committed in any of these rulings.

Thirteen assignments of error relate to the exclusion of testimony on the part of the defendant, showing that less was charged by the attorneys for the other side, in the same causes when the plaintiff was engaged for her, than was charged by the plaintiff, and that the services of the former were quite as important, and of as much, or even greater, value than were those of the plaintiff. The circuit judge did right in rejecting this testimony. The defendant's counsel might not have charged what their services were worth, or even performed them gratuitously, as is often the case where parties are unable to pay.

The Court allowed the plaintiff, in describing the services he performed for the defendant, to say that, "I had consultations with Mary Ann Bumpus, Samuel R. Bumpus, Myron Bumpus, and a great number of witnesses." Defendant moved to strike this testimony out, because such service was not specifically stated in the declaration or bill of items. This was not done.

There was no error in this ruling. The testimony descriptive of the character of the services charged for was admissible under the pleadings. It was also competent to ask the plaintiff, when on the stand, what was the amount involved in the five suits, or in any one or more of them; also the total amount charged for his services in either or all of them. The amount involved in the issue has very much to do with the value of the services rendered, and the responsibility assumed by the attorney. The Court stated the law correctly in his rulings upon these several subjects. The total amount charged was certainly competent, as the reasonableness of this was one of the questions to be passed upon by the jury, if they did not find a contract relating thereto, as claimed by either of the parties.

Six exceptions were taken by defendant's counsel to remarks made by the circuit judge which she deemed prejudicial to her case, and which it is claimed ought not to have been made. We have examined what was said on these several occasions by the circuit judge, as it appears in the record, and we do not think either of these exceptions should be sustained. A lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect, and for that purpose. Neither is there any implied contract when he is employed in a case, or any matter of legal business, that he will bring to bear learning, skill, or ability beyond that of the average of his profession. Nor can more than ordinary care and diligence be required of him, without a special contract made, requiring it. Any other rule would subject his rights to be controlled by the vagaries and imaginations of witnesses and jurors, and not infrequently to the errors committed by courts. This the law never has done; and the fact that the best lawyers in the country find themselves mistaken as to what the law is, and are constantly differing as to the application of the law to a given state of facts, and even the ablest jurists find themselves frequently differing as to both, shows both the fallacy and danger of any other doctrine; and especially is this so as to questions of practice, the construction of statutes, and particularly those arising under our criminal and probate laws. Frequently we find the decisions of courts of last resort in the different States directly opposed to each other

upon the same questions, and resting upon the same state of facts. These all admonish courts and jurors that great care and consideration should be given to questions involving the proper service to be rendered by attorneys when they have acted in good faith, and with a fair degree of intelligence, in the discharge of their duties, when employed under the usual implied contract. Under such circumstances, the errors which may be made by them must be very gross before the attorney can be held responsible. They should be such as to render wholly improbable a disagreement among good lawyers as to the character of the services required to be performed, and as to the manner of its performance under all the circumstances in the given case, before such responsibility attaches. We find no error under either or any of these exceptions, committed in the rulings of the circuit judge upon this subject.

The next group of exceptions, numbering four, relates to the testimony given by witness Crone. They mostly concerned the value of Babbitt's services and the manner in which he conducted the defendant's business, and certain transactions and telegrams between counsel. We have examined them all in the record, and find no fault in the judge's rulings concerning them.

The next four assignments presented by defendant, and argued, are: *First*. Referring to one of defendant's suits which was discontinued, defendant's counsel asked witness Myron Bumpus, "Did I advise you [meaning Mr. Burroughs] to discontinue it?" *Second*. "Why did your mother, through you, [Myron] take Mr. Babbitt's advice, rather than mine?" (meaning Mr. Burroughs.) *Third*. "Well, about how much will it cost you to go on with that case?" *Fourth*. "Was it not because Mr. Babbitt was your attorney of record, and because he had control of the case as such?" These questions were all put to the witness, Myron Bumpus, who, it was claimed, acted for his mother, the defendant, and were all irrelevant under the view we take of the case, and the Court committed no error in excluding the answers.

It appears, when the settlement of one of the suits occurred, Myron, who acted for his mother, requested Mr. Babbitt to so make it that it would be final as to all matters between her and Isaac Bumpus, the plaintiff. This Isaac's counsel would not

consent to, and the settlement was made without it, and Isaac brought suit again against the defendant, and about three months thereafter discontinued it. This second suit was brought in the Wayne circuit, and counsel for defendant asked Myron, when on the stand, "What was the damage you sustained by the bringing of the Wayne county suit after the settlement?" The witness was not allowed to answer, and, we think, properly so. It did not appear that it was by Babbitt's fault that the defendant was subjected to the claimed expense. This was defendant's thirty-fourth assignment of error.

We see nothing in defendant's tenth, thirty-second, or thirty-third assignments of error needing further notice. None of them can be sustained.

At the close of the trial the defendant's counsel asked the Court to instruct the jury as follows :

"(5) That Myron Bumpus, without conflict, appears to have had the management of defendant's business in all the litigation referred to in this case, for which the plaintiff seeks to recover ; and that the bargain, either under plaintiff's or defendant's version, was made by and between plaintiff and Myron ; and that, if the jury believe from Myron's testimony that some time after plaintiff came to Detroit in the interest of Myron in the murder case, and that this was after all the services were performed by plaintiff, and that Myron called at the office of Mr. Babbitt, and there requested the plaintiff to show his books and make a settlement, and that plaintiff refused so to do, claiming that it was unnecessary, as he (plaintiff) had looked his books over and found that he was indebted to defendant, having received enough moneys to pay him for his services, then and in such case the plaintiff cannot recover, and the verdict of the jury must be for defendant."

"(7) Plaintiff has introduced testimony tending to show the value of his services, and, if he relies upon value, rather than upon his express contract as alleged, he must stand by the actual value of his services, and must accept, under the law, such amounts as those services were reasonably worth ; and if, from all the testimony in this case, the jury believe the amounts which he has received, and of which he acknowledges credits, were sufficient in amount to compensate him for his services, then and in such case he cannot recover, and the verdict of the jury must be for the defendant."

We think these requests state the law applicable to the facts in this case in terse and succinct language, and we can see no reason why they should not have been given ; and their substance was really not given in the general charge, or, if it was, it was in a manner that might be easily misunderstood by the jury.

A party has the right to have the law of his case go to the jury in its plainest, simplest form ; and if it is properly em-

bodied in a request in that form, prepared by counsel, and furnished to the Court, it ought to be thus given, and the request should not be ignored by the Court. We have had occasion to allude to this subject before, and when the Court declines to give such requests, it must appear that the substance of them has been as well given by the Court in its own language, or the omission will be error.

The defendant requested the Court to submit five special questions, in writing, to the jury, for their special findings, as follows:

"(1) What was the value of plaintiff's services?"

"(2) Has not defendant paid and caused to have been paid to plaintiff, sufficient amounts of money and produce to compensate him in full for his services and expenses?"

"(3) Has not defendant paid and caused to have been paid to plaintiff the following amounts, to wit: \$1,484.85; credited produce admitted, \$45.46; note of August 15, 1883, amounting to \$150; total, \$1,680.31?"

"(4) At the time plaintiff was discharged, in April or May, 1883, did not plaintiff admit to Myron that he had looked the matter all over, and that he was in defendant's debt at the time?"

"(5) Was not the bargain between plaintiff and defendant, that plaintiff was to have had \$25 for each retainer, and \$25 for his services each day actually engaged in the courts, and expenses, for his services?"

"*The Court.* I will decline to do that, Mr. Burroughs."

The first, second, and third of these special requests should have been submitted to the jury. They ask for the finding of questions of fact, and it was the privilege of the defendant to have them found specially.

We think when the Court said, in speaking of the duty of the plaintiff while in the service of the defendant as her attorney, "Now, an attorney is obliged to do the very best he can. In this case here, it has been done. * * * I don't think you are warranted, by the testimony, in saying that Mr. Babbitt was in any way negligent," he went too far. While these statements may not have prejudiced the rights of the defendant before the jury, it is not our privilege to say they did not. They might have done so, and such certainly was their tendency. We think it was error.

For the errors mentioned, the judgment must be reversed, and a new trial granted.

The other Justices concurred.

An attorney is liable to his client for gross negligence, or gross ignorance, in the performance of his professional duties: *Pennington v. Yell* (1850), 11 Ark. 212; *Evans v. Watrous* (1835), 2 Por. (Ala.) 205; *Montrion v. Jeffreys* (1825), 2 C. & P. 113; *Wilson v. Russ* (1841), 20 Me. 421; *Weimer v. Sloane* (1854), U. S. D. Ct., Dist. Ohio, 6 McLean 259; *Ex parte Giberson* (1835), U. S. C. Ct., Dist. Columbia, 4 Cranch C. C. Rep. 503; *Cox v. Sullivan* (1849), 7 Ga. 144; *O'Barr v. Alexander* (1867), 37 Id. 195; *Holmes v. Peck* (1849), 1 R. I. 242; *Wilcox v. Plummer* (1830), 4 Pet. (29 U. S.), 172; *Wynn v. Wilson* (1855), U. S. C. Ct. Dist. Ark., Hemp. 698; *Bowman v. Tallman* (1864), 27 How. Pr. (N. Y.) 212; *Gambert v. Hart* (1872), 44 Cal. 542; *Gallagher v. Thompson* (1833), Wright, Chan. (Ohio) 466; *Stevens v. Walker* (1870), 55 Ill. 151; *Watson v. Muirhead* (1868), 57 Pa. 161.

Gross Negligence Defined.

The want of ordinary skill and care and reasonable diligence, is, in the case of an attorney, gross negligence; *Pennington v. Yell* (1850), 11 Ark. 212.

Hence, where a client has suffered damage through the gross negligence, or gross ignorance, of his attorney, he has a right of action against him for the damages sustained: *Hopping v. Quin* (1834), 12 Wend. (N. Y.) 517; *Estate of A. B.* (1866), 1 Tuck. (N. Y.) 247; *Hatch v. Fogerty* (1871), 10 Abb. Prac. N. S. (N. Y.) 147; *Eggleston v. Boardman* (1877), 37 Mich. 14; *Morrill v. Graham* (1864), 27 Tex. 646; *Sevier v. Holliday* (1840), 2 Ark. 512; *Palmer v. Ashby* (1840), 3 Id. 75; *Wilson v. Russ* (1841), 20 Me. 421; *Evans v. Watrous* (1835), 2 Por. (Ala.) 205; *O'Barr v. Alexander* (1867), 37 Ga. 195; *Caverly v. McOwen* (1878), 123 Mass. 574; *Gleason v. Clark* (1828), 9 Cow. (N. Y.) 57; *Wilson v. Coffin*

(1848), 2 Cush. (Mass.) 316; *Hastings v. Halleck* (1859), 13 Cal. 203; *Nisbet v. Lawson* (1846), 1 Ga. 275; *Cox v. Sullivan* (1849), 7 Id. 144; *Holmes v. Peck* (1849), 1 R. I. 242; *Saydam v. Vance* (1840), U. S. C. Ct. Dist. Ind., 2 McLean 99; *Morrill v. Graham* (1864), 27 Tex. 646; *Reilly v. Cavanaugh* (1868), 29 Ind. 435; *Mardis v. Shackelford* (1842), 4 Ala. 493; *Walker v. Scott* (1853), 13 Ark. 644; *Stevens v. Walker* (1870), 55 Ill. 151; *Chase v. Heaney* (1873), 70 Id. 268.

In *Godefroy v. Dalton* (1830), 6 Bing. 467; 4 Moo. & P. 149, TINDAL, C. J., explained the rule of an attorney's liability with much clearness: "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a case, is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crasse negligentia*, or *lata culpa*, mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, appear to establish, in general, that an attorney is liable for the consequences of ignorance or non-observance of the rules of practice; for want of care in the preparation of the cause for trial, or of attendance thereon, with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. But, on the other hand, he is not answerable for error in judgment, upon points of new occurrence, or of nice and doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of the law."

And in an American case (*Bowman v. Tallman* (1864), 27 How. Pr. (N. Y.) 274, it is said: "There is no implied agreement in the relation of counsel and client, or in the employment of

the former by the latter, that the former will guarantee the success of his proceedings in a suit, or the soundness of his opinions, or that they will be ultimately sustained by a court of last resort. * * * He only undertakes to avoid errors which no member of his profession, of ordinary prudence, diligence and skill, would commit. * * * It is not enough that doubts may be raised of the soundness of his opinions or correctness of his course, unless they are accompanied by the absence of all reasonable doubts of the propriety of an opposite course or opinion in the mind of every member of his profession of ordinary skill, sagacity, and prudence, caused by a decisiveness of reason and authority in its favor."

Counsel and Attorneys.

In England, while attorneys are responsible to their clients for negligence, counsel and barristers are not. In the United States this distinction does not exist: *Story on Agency*, § 24, note. The negligence of the client does not affect the liability of the attorney: *Cox v. Sullivan* (1849), 7 Ga. 144.

Mistakes of Law.

An attorney is not liable for a mistake in a point of law which is in doubt, or for a wrong construction of a doubtful statute: *Morrill v. Graham* (1864), 27 Tex. 646; *Crasbie v. Murphy* (1858), 8 Ir. C. L. 301; *Elkington v. Holland* (1842), 9 M. & W. 659; *Bulmer v. Gilman* (1842), 4 M. & G. 108. He cannot be charged with negligence, where he accepts as a correct exposition of the law, a solemn decision of the Supreme Court of the State: *Marsh v. Whitmore* (1874), 21 Wall. (88 U. S.) 178; *Hastings v. Halleck* (1859), 13 Cal. 203. An error of judgment upon a doubtful question of the construction of a statute is not evidence of a want of skill or of negligence: *Caverley v. Mc-*

Owen (1878), 123 Mass. 574; *Bulmer v. Gilman*, *supra*.

Where a father, whose minor son had received injuries through the negligence of a third party, employs counsel to sue him for damages, no legal obligation is, in the absence of an express understanding, imposed on such counsel, to bring suit in the name of the father, as well as in that of the son: *Youngman v. Miller* (1881), 98 Pa. 196.

Conveyancing.

In examining titles to real estate and making abstracts, one impliedly undertakes that he possesses the requisite knowledge and skill, and will use due and ordinary care in the performance of the duty; and for a failure in either of these respects, resulting in damages, the party injured is entitled to recover: *Chase v. Heaney* (1873), 70 Ill. 268; *Rankin v. Schaefer* (1877), 4 Mo. App. 108. He cannot set up, in defence to an action for damages for his negligence in overlooking a lien, that such lien was erroneous or of doubtful validity: *Gilman v. Hovey* (1858), 26 Mo. 280.

An attorney employed to record a mortgage, but who neglects to do so until after other subsequent incumbrances have been recorded, is liable immediately to the mortgagee for all the damages which are likely to be sustained by his default: *Miller v. Wilson* (1854), 24 Pa. 114. But where a person, having title papers to land placed in his hands as agent and attorney, with authority to effect a sale of the land, entrusted the papers to a third person for examination and with a view of making a sale to him, and the party so entrusted with the papers, being charged with some crime, absconded and took the papers with him, it was held that this act of the agent, which resulted in a loss of the papers, was not negligence on his part, so as to impose any liability

on him therefor: *Stanberry v. Moore* (1870), 56 Ill. 472.

An attorney, who is also a notary public, is liable for neglect in not recording a mortgage which he had drawn for his client and agreed to deliver to the recording officer: *Stoll v. Harrison* (1880), 73 Ind. 17.

An attorney, employed to draw a building contract, is not liable for not filing the contract so as to prevent liens from attaching: *Fenaille v. Coudert* (1882), 44 N. J. L. 286. A conveyancer is not liable for passing a title with an incumbrance, when, in his opinion, the incumbrance was not legally a lien, though it turns out otherwise. In *Watson v. Muirhead* (1868), 57 Pa. 161, the Court say: "The business of a conveyancer is one of great importance and responsibility. It requires an acquaintance with the general principles of the law of real property and a large amount of practical knowledge, which can only be derived from experience. In England, it has been pursued by lawyers of the greatest eminence. As our titles become more complex, with the increase of wealth, and the desires which always accompany it, to continue it in our name and family as long as the law will permit, it will become more and more necessary that gentlemen prepared by a course of liberal education and previous study, should devote themselves to it. There have been, and still are, such among us. The rule of liability for errors of judgment, as applied to them, ought to be the same as in the case of gentlemen in the practice of law or medicine. It is not a mere art, but a science. 'That part of the profession,' said Lord MANSFIELD, 'which is carried on by attorneys, is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected, when they act to the best

of their skill and knowledge. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake. * * * A counsel may mistake, as well as an attorney. Yet, no one will say that a counsel, who has been mistaken, shall be charged. * * * Not only counsel, but judges, may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable in case of a reasonable doubt: *Pitt v. Valden* (1767), 4 Burr. 2060.' The rule declared by Lord MANSFIELD has been followed in all the subsequent cases. 'No attorney,' said C. J. ABBOTT, 'is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law; or that an attorney is to lose his fair recompense, on account of an error, being such an error as a cautious man might fall into:' *Montriou v. Jefferys* (1825), 2 C. & P. 113."

Ignorance of Practice.

[Hence, where an attorney produced the prothonotary's book in evidence, instead of the record of a judgment, and his case was therefore nonsuited, the attorney was not liable, because negligence had been the gist of the action, and the judgment was only alleged as the consequence of that negligence: *Godefroy v. Dalton* (1830), 6 Bing. 460.

But an attorney is liable for mistakes of well-known principles and rules of law: *Goodman v. Walker* (1857), 30 Ala. 482; *Morrill v. Graham* (1864), 27 Tex. 646; as that a note is not due until the expiration of the three days of grace, and cannot be sued on before that: *Hopping v. Quinn* (1834), 12 Wend. (N. Y.) 517. In *Goodman v. Walker*, STONE, J., said: "I lay down the rule, then, for the determination of this case as follows: If the law govern-

ing the bringing of this suit was well and clearly defined, both in the text books and in our decisions, and if the rule had existed and been published long enough to justify the belief that it was known to the profession, then a disregard of such rule by an attorney-at-law renders him accountable for the losses caused by such negligence or want of skill; negligence, if, knowing the rule, he disregarded it; want of skill, if he was ignorant of the rule." So the disregard of a plain statutory provision is negligence for which the attorney is liable: *Caverly v. McOwen* (1878), 123 Mass. 575; *Estate of A. B.* (1866), 1 Tuck. (N. Y.) 247.

Assent of Client to Ignorance of Attorney.

[Where an attorney for a defendant paid the amount of the judgment against his client, to the clerk of the Court, with the assent of his client, who also knew that the judgment creditor had not been paid by the clerk; and such payment did not operate as a satisfaction of the judgment; and the clerk, after nine or ten months' further incumbency in his office, died insolvent: the Court held that the attorney was acting merely as agent, and not as a professional man, and there being entire good faith, there could not be any recovery against such agent. "Especially should this be so, where, as here, the principal is guilty of negligence after having been directly put upon inquiry. When the appellee was informed, as he was at least twice, that the judgment creditor had not received the money, he ought to have taken some steps to see that it reached her:" ELLIOTT, C. J., p. 230.

[Otherwise the attorney would have been liable; for the same judge said: "It is the duty of a lawyer to know whether public matters, such as the duties of the officers connected with the court in which he practices, are regu-

lated by the statute. A lawyer who does not know whether the duties of the clerk of the court, in which his professional duties are performed, are, or are not, defined by statute, cannot be deemed to possess competent skill. It is a lawyer's duty to know the elementary rules of law upon familiar matters of practice, as well as the settled rules governing matters which spring out of the ordinary transactions of every-day life, and which are of frequent application. A rudimental knowledge of the law would have acquainted the appellants' intestate with the elementary rule, that payment must be made to the creditor, or to some one duly authorized to act for him. A rule so long settled, and so familiar, ought to be known to all who assume the character of lawyers. A knowledge of the statutes would have shown the intestate that there was, in them, no provision changing the familiar and long established rule. It must be held that if the intestate was the appellee's attorney when he paid the money to Edsall [the court clerk], and paid it as his attorney, a right of action accrued to the appellee [the client and judgment debtor], because competent skill was either not possessed, or was not exercised:" Id. 227-8.

Drawing Papers and Pleadings.

The attorney is liable for mistakes negligently made in drawing papers and pleadings: *Reilly v. Cavanaugh* (1868), 29 Ind. 435; *Oldham v. Sparks* (1866), 28 Tex. 425; *Fitch v. Scott* (1839), 3 How. (Miss.) 314; *Watson v. Muirhead* (1868), 57 Pa. 161; as for suing for twelve dollars instead of twelve hundred: *Varnum v. Martin* (1834), 15 Pick. (Mass.) 440. But he cannot be held liable for his mistake in misdescribing land on which he was employed to enforce his client's lien, if, notwithstanding, it does not appear that

his client has sustained damage : *Joy v. Morgan* (1886), 35 Minn. 184.

Prosecution of Suit.

It is negligence in an attorney to bring an action too soon : *Hopping v. Quin* (1834), 12 Wend. (N. Y.) 517, or to neglect to bring it until too late to recover : *Smedes v. Elmendorf* (1808), 3 Johns. (N. Y.) 185 ; *Oldham v. Sparks* (1866), 28 Tex. 425 ; *Stevens v. Walker* (1870), 55 Ill. 151.

Also, to bring suit in the wrong county : *Kemp v. Burt* (1833), 4 B. & Ad. 424 ; or, in a court which has not jurisdiction of the suit : *Williams v. Gibbs* (1836), 5 Ad. & E. 208 ; or, to improperly dismiss a suit : *Walpole v. Carlisle* (1869), 32 Ind. 415 ; *Copewood v. Baldwin* (1852), 25 Miss. 129 ; or, to neglect to prosecute a motion for a new trial whereby it is not finally awarded to his client : *Drais v. Hogan* (1875), 50 Cal. 121.

It is the duty of the attorney, employed to collect a debt, to sue out all the necessary process to enforce the claim, and for a failure to do so, he is liable to the client : *Crooker v. Hutchinson* (1824), 2 D. Chip. (Vt.) 117 ; *McWilliams v. Hopkins* (1834), 4 Rawle (Pa.) 382 ; *Fitch v. Scott* (1839), 3 How. (Miss.) 314 ; *Wright v. Ligon* (1824), Harp. Eq. (S.C.) 137 ; *Smallwood v. Norton* (1841), 20 Me. 83 ; *Cox v. Sullivan* (1849), 7 Ga. 144.

In *Pennington v. Yell* (1850), 11 Ark. 212, a leading case on the liability of the attorney, the Court say : " As authority and duty, in the relation of client and attorney, are correlative terms, in the same sense that right and obligation are so, in a general sense, it results from the law, as it now stands, that, when an attorney undertakes the collection of a debt, it becomes his duty to sue out all process, both mesne and final, necessary to effect that object ; and consequently that he must not only

sue out the first process of execution, but all such that may become necessary. This undoubtedly is the true general doctrine on this subject, qualified, however, as will be presently seen, by a pervading principle that fairly grows out of the peculiar character of the attorney's functions. But although it is his duty thus to pursue his client's cause through all its stages, he is not imperiously bound to institute new collateral suits, without special instructions to do so—as actions against the sheriff, or clerk, for the failure of their duty in the issuance or service of process. He should pursue bail, however, and those who may have become bound with the defendant, either before or after judgment, in the progress of the suit. Nor is he bound to attend in person to the levy of an execution, or to search out for property, out of which to make the debt ; this is the business of the sheriff. Nor is he liable for any of the shortcomings of that officer. But, in reference to all these professional duties, the courts have recognized a principle to which we have already alluded, that does not, by any means, move the line between reasonable diligence and *crassa negligentia*, and thus in fact place the attorney further from responsibility to his client ; but so far as its operation is in any sort to his protection, it is so only by its influence upon the determination of the question of fact, whether or not the act, or omission, complained of, did really amount to that degree of crassitude for which the law holds him liable. The principle is, that the attorney will always be justified in ceasing to proceed with his client's cause (unless specially instructed to go on) whenever he shall be *bona fide* influenced to this course by a prudent regard for the interest of his client : *Crooker v. Hutchinson* (1824), 2 D. Chip. (Vt.) 117 ; 2 Greenl. Ev., § 145. This principle would seem to grow

directly out of the peculiar character of the functions of an attorney-at-law, and to be founded on sound public policy. For, in the nature of things, these duties cannot in general be performed in a manner to subserve the true interest of the client, if limited to that strict line of routine conduct which is chalked out by the law as the pathway for ordinary agents, and it is therefore inevitable that, in the discharge of these duties, they must be intrusted with a large and liberal share of discretion."

So, an attorney is liable for a failure to seasonably sue out a *scire facias* where the execution has been returned *non est inventus*: *Dearborn v. Dearborn* (1818), 15 Mass. 316; for not delivering an execution to the officer within thirty days after judgment, if an attachment is lost thereby: *Phillips v. Bridge* (1814), 11 Id. 242.

Where an attorney employed to prosecute a suit for the recovery of valuable land, when a jury had returned a verdict in his favor, took the same, and by his negligence and unskillfulness altered the verdict so as to include only a worthless piece of the property sought to be recovered, and, at his request, the jury accepted the same as their verdict, to the plaintiff's damage, it was held that he was liable: *Skillen v. Wallace* (1871), 36 Ind. 319. Where an attorney was employed to conduct a case in the district court, and a judgment was rendered against his client, and he was entitled to a new trial, and obtained one, but conducted the proceedings, in obtaining the new trial, so carelessly and negligently that the order granting the same was reversed in the Supreme Court, it was held that he was liable to the client for the loss sustained thereby, and his liability was not destroyed by the fact that his client employed other counsel in the Supreme Court: *Drais v. Hogan* (1875), 50 Cal. 121. But he is not liable for the loss of papers stolen

from him, without negligence on his part: *Hill v. Barney* (1848), 18 N. H. 607.

He is not guilty of negligence in forbearing to bring a suit, where the parties had agreed to leave one of the matters in dispute to arbitration, the decision of which would render an action unnecessary: *Hogg v. Martin* (1835), Riley (S. C.) 156; nor in failing to pursue the extraordinary remedy of attachment, the owner of the claim having neither made affidavit nor given bond: *Foulks v. Falls* (1883), 91 Ind. 315; nor for omitting to defend a suit, if not instructed in the defence: *Benton v. Craig* (1830), 2 Mo. 198; nor is he liable for a failure to file a note, which he has received for collection by suit, as a claim against the estate of the maker, upon the death and declaration of the insolvency of the estate of the latter, when said facts occurred after he received the note and without his knowledge: *Stubbs v. Beene* (1861), 37 Ala. 627. Where an attorney is directed to collect a note containing no waiver of the appraisement laws, and obtains a judgment with such waiver, the client cannot complain, although the debtor's property sold for much less than its value, and the whole amount of the judgment was not realized: *Nickless v. Pearson* (1882), 81 Ind. 427. Where a demand against persons known to be insolvent, was left with an attorney, with instructions to do the best he could with it, and he received the notes of third persons for the debt, but, in consequence of the fraud of the debtors, such notes were not collected, it was held that he was not responsible for the loss: *Wright v. Ligon* (1824), 1 Harp. Eq. (S. C.) 137.

Giving Advice.

An attorney is liable where he gives to the client plainly erroneous advice, from which the client, by following, is

damaged: *Gihon v. Albert* (1838), 7 Paige (N.Y.) 278.

Negligence a Question of Fact.

Whether the conduct of an attorney in a particular case, is or is not gross negligence, is a question to be determined in each case by the jury, on the evidence: *Walker v. Goodman* (1852), 21 Ala. 647; *Pennington v. Yell* (1850), 11 Ark. 212; *Dearborn v. Dearborn* (1818), 15 Mass. 316; *Waldpole v. Carlisle* (1869), 32 Ind. 415.

In California, however, the facts being ascertained, the question of negligence is one of law for the Court: *Gambert v. Hart* (1872), 44 Cal. 542.

Failure to Follow Instructions.

The attorney must follow the instructions of his client. "Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, for that loss the attorney is responsible:" *Gilbert v. Williams* (1811), 8 Mass. 51; *Nare v. Baird* (1859), 12 Ind. 318; *Wilcox v. Plummer* (1830), 4 Pet. (29 U. S.) 172; *Cox v. Livingston* (1841), 2 W. & S. (Pa.) 103; *Armstrong v. Craig* (1854), 18 Barb. (N. Y.) 387.

Thus, where the holder of a note places it in the hands of an attorney and instructs him to bring suit on it, but the attorney honestly believing that it would be better not to sue then, omits to do so, and the money is lost by the maker's subsequent insolvency, the attorney is liable to an action by the client: *Cox v. Livingston* (1841), 2 W. & S. (Pa.) 103.

As to the general conduct of the suit, the attorney acts according to his judgment and discretion; in these matters the client has no right to control him; he may do what he thinks is proper, even though against the wishes of the client: *Anonymous* (1828), 1 Wend. (N. Y.) 108; *Read v. French* (1863), 28 N. Y. 285.

Special Agreements.

Where the plaintiff handed to certain attorneys claims against a bankrupt, "to file against the estate and to obtain any dividend that he may be allowed on the same," it was held that this did not show a special contract to resist the bankrupt's discharge, and that the attorneys were entitled to use their discretion in withdrawing such resistance: *Bennett v. Phillips* (1881), 57 Iowa 174. A contract by an attorney, to save his client harmless from all responsibility in a suit pending against him, or to refund his fee, conceding it to be valid, extends only to such liabilities as the law would recognize or enforce; and if the client suffers a judgment to be rendered against him, in favor of another attorney, whom he never had employed for professional services in the same suit, he cannot resort to his contract of indemnity: *Lindsey v. Jones* (1853), 23 Ala. 835.

Liability for Mistakes or Frauds of Agents or Associates.

An attorney is liable for the negligence or fraud of another attorney whom he employs as his agent: *Riddle v. Poorman* (1831), 3 P. & W. (Pa.) 224; *Poole v. Gist* (1827), 4 McCord (S. C.) 259; *Walker v. Sterns* (1875), 79 Ill. 193; *Smallwood v. Norton* (1841), 20 Me. 83; *Pollard v. Rowland* (1826), 2 Blackf. (Ind.) 22; *Grayson v. Wilkinson* (1845), 5 S. & M. (Miss.) 268; *Birbeck v. Stafford* (1862), 14 Abb. Pr. (N. Y.) 285; *Cummins v. Herald* (1880), 24 Kan. 600.

So, each partner in a firm of attorneys, is liable for the want of skill or negligence of the others: *Livingston v. Cox* (1847), 6 Pa. 360; *Dwight v. Simon* (1849), 4 La. An. 490; *Poole v. Gist* (1827), 4 McCord (S. C.) 259; *Wilkinson v. Griswold* (1845), 12 S. & M. (Miss.) 669.

For like reasons, a mercantile col-

lecting agency, receiving a note "for collection," is liable for the negligence of attorneys or agents employed by them in other parts of the country. In *Bradstreet v. Everson* (1872), 72 Pa. 124, AGNEW, J., said: "It is argued, notwithstanding the express receipt 'for collection,' that the defendants did not undertake for themselves to collect, but only to remit to a proper and responsible attorney, and made themselves liable only for diligence in correspondence, and giving the necessary information to the plaintiffs; or, in briefer terms, that the attorney in Memphis was not their agent for the collection, but that of the plaintiffs only. The current of decision, however, is otherwise, as to attorneys-at-law sending claims to correspondents for collection, and the reasons for applying the same rule to collection agencies are even stronger. They have their selected agents in every part of the country. From the nature of such ramified institutions we must conclude that the public impression will be, that the agency invited customers on the very ground of its facilities for making distant connections. It must be presumed from its business connections at remote points, and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason, therefore, to hold that such an agency is liable for collections made by its own agents, when it undertakes the collection by the express terms of the receipt. If it does not so intend, it has it in its power to limit responsibility by the terms of the receipt. An example of this limited liability is found in the case of *Bullitt v. Baird* (*infra*), decided at Philadelphia in 1870; the only case in this State upon the subject of such agencies. There the receipt read, 'For collection according to our direction, and proceeds, when received by us, to

be paid over to King and Baird.' Across the face of the receipt was printed these words: 'N. B. The owner of the within mentioned, taking all the risks of the mail, of losses by failure of agents to remit, and also of losses by reason of insurrection or war.' The limitation of the liability of Bullitt & Fairthorn, by Mr. Bullitt, himself a good lawyer, is evidence of his belief that a greater liability would arise without the restriction."

[This was affirmed in *Morgan v. Tener* (1877), 81 Pa. 305.

An attorney, who has collected money for his client, will, if he deliver it to a third person to carry to his client, without authority, or directions, from the client to do so, be liable to his client for the sum thus collected, if the same be stolen from such third person while on his way with the money, even though such person were trustworthy and took the same care of the money that he did of his own: *Grayson v. Wilkinson* (1845), 5 S. & M. (Miss.) 268. But where an attorney directed by a mortgagee of certain horses and harness, to take possession of them under the mortgage, went with an officer to the stable where they were and took possession of them, and the stable was then leased from the mortgagor and a custodian selected by the mortgagee was placed in charge of the property, it was held that the attorney was not liable for the custodian's neglect in permitting the property to be afterwards seized under an execution: *Gaines v. Becker* (1880), 7 Bradw. (Ill.)

Acting Without Authority.

If an attorney commence, or defend, an action, or suit, without authority, he is liable to the principal for damages: *Gilbert v. Williams* (1811), 8 Mass. 31; *Cyphert v. McClune* (1853), 22 Pa. 195; *O'Hara v. Brophy* (1863), 24 How. Prac. (N. Y.) 379; *Piggott v.*

Addicks (1852), 3 G. Greene (Iowa) 427; *Marvel v. Manouvrier* (1859), 14 La. An. 3; *Dorsey v. Kyle* (1869), 30 Md. 512. An action for money had and received will lie against an attorney who, having a debt to collect, receives in payment debts on himself, or on others, without authority from his principal: *Houx v. Russell* (1846), 10 Mo. 246.

Acting in Excess of Authority.

So, the attorney is liable to his client for damages arising to the latter through his acting in excess of his authority: *Anon.* (1828), 1 Wend. (N.Y.) 108. An attorney entering satisfaction of a judgment without full payment, is personally liable to his client for the unpaid balance; *People v. Cole* (1876), 84 Ill. 327. Where attorneys collected and transmitted to their clients, funds in depreciated bank paper, which the clients refused to receive and sent back, with an offer to return to them, and a request to make up the difference, and the attorneys declined to do anything about it, it was held that the clients had a right to sell the paper and recover the deficiency from the attorneys: *West v. Ball* (1847), 12 Ala. 240.

Matters Outside his Profession.

An attorney is not liable for not acting as to matters not implied in the business of an attorney, or not within the scope of the profession: *Hughes v. Boyce* (1847), 2 La. An. 803; as, for example, demanding payment of a note, and giving notice to the indorser.

In *Odlin v. Stetson* (1840), 17 Me. 244, the Court said: "When a person offers his services to the public, in any business, trade or profession, there is an implied engagement with those who employ him, that he will perform the business intrusted to him, faithfully, diligently, and skillfully. And if he

fails to do so, he is answerable for the damages suffered by reason of such neglect. This engagement is limited, however, by the nature of the business, and often, also, by its being carried on only in a particular place. Thus an insurance, or ship broker, resident in a certain city, would not be expected to effect insurance, or obtain a freight, in a distant city, unless such were proved to be his usual course of business, without a special undertaking to do it. So, a notary cannot be expected to perform the duties of an attorney, nor an attorney those of a notary, without some special engagement, unless there be proof of a combination of these employments, or of a course of business authorizing those employing him to expect that he will do so. The case finds that the defendants were not notaries; and it does not appear that they had so conducted their business as to authorize any one to expect them to act in any other character or manner than is usual for attorneys. The Court must understand from the law, and from the customary course of business as exhibited in cases coming before them, that negotiable paper is placed in the hands of a notary, or special agent, to have the necessary presentment made and notices given. Cases may, and do occur, where an attorney acts also as a notary, and where also an attorney is called upon for advice respecting the manner of performing these duties; and he may in such, and probably in other cases, undertake to have them properly done, and in such cases he will be responsible."

Proceedings not Affected.

The remedy of the client is against the attorney alone. His negligence, or ignorance, whereby the client fails in his suit, cannot, as a rule, be made a ground for setting aside the judgment or decree: *People v. Rains* (1863),

23 Cal. 127; *Quin v. Weatherbee* (1871), 41 Id. 247; *Dibble v. Truluck* (1868), 12 Fla. 185; *Burton v. Wiley* (1854), 26 Vt. 430; *Farmers' Co. v. Whitworth Bk.* (1868), 23 Wis. 249; *Burton v. Hynson* (1853), 14 Ark. 32; *Austin v. Nelson* (1877), 11 Mo. 192; *Kerby v. Chadwell* (1847), 10 Id. 392; *Gehrke v. Jod* (1875), 59 Id. 522; *Biebinger v. Taylor* (1876), 64 Id. 63; *Spaulding v. Thompson* (1859), 12 Ind. 477; *Merritt v. Putnam* (1862), 7 Minn. 493; *Babcock v. Brown* (1853), 25 Vt. 550; *Jones v. Leech* (1877), 46 Iowa 186; *Matthis v. Cameron* (1876), 62 Mo. 504; *Niagara Ins. Co. v. Rodecker* (1877), 47 Iowa 162.

So, a party to a suit, cannot plead the neglect of his counsel as an excuse for his own negligence, where he is capable of acting in the matter for himself and by himself: *Boing v. Raleigh & G. R. Co.* (1883), 88 N. C. 62. In New York it has been held that a judgment obtained by default through the neglect of the defendant's attorney, will be set aside, when it appears that the attorney is insolvent and the client otherwise would be remediless: *Meacham v. Dudley* (1831), 6 Wend. (N. Y.) 514; *Elston v. Schelling* (1868), 7 Robt. (Id.) 74; *Sharp v. Mayor* (1860), 31 Barb. (Id.) 578, and *Grill v. Vernon* (1871), 65 N. C. 76.

Measure of Damages.

The client must have suffered an injury, or he cannot maintain an action, even for nominal damages: *Grayson v. Wilkinson* (1845), 5 S. & M. (Miss.) 268; *Suydam v. Vance* (1840), U. S. Cir. Ct., Dist. Ind., 2 McLean 99; *Harter v. Morris* (1869), 18 Ohio 492; *Arnold v. Robertson* (1870), 3 Daly (N. Y.) 298; *Bruce v. Baxter* (1881), 7 Lea (Tenn.) 477.

"Two things are to be shown in order to subject an attorney to an action: (1) Gross or unreasonable neg-

ligence or ignorance, and (2) A consequent loss to his client:" *Fitch v. Scott* (1839), 3 How. (Miss.) 314.

The measure of damages is the actual loss sustained: *Pennington v. Yell* (1850), 11 Ark. 212; *Stevens v. Walker* (1870), 55 Ill. 151; *Rodes v. Stone* (1831), 2 Lea (Tenn.) 650; *Crooker v. Hutchinson* (1824), 2 D. Chip. (Vt.) 117; *Nisbet v. Lawson* (1846), 1 Ga. 275; *Cox v. Sullivan* (1849), 7 Id. 144; *Mardis v. Shuckelford* (1842), 4 Ala. 493; *Eccles v. Stephenson* (1814), 3 Bibb (Ky.) 517; *Arnold v. Robinson* (1870), 3 Daly (N. Y.) 298; *Suydam v. Vance* (1840), U. S. Circ. Ct., Dist. Ind., 2 McLean 99; *Grayson v. Wilkinson* (1845), 5 S. & M. (Miss.) 268; *Langmade v. Glenn* (1876), 57 Ga. 525. It is not necessarily the amount of the claim which was not recovered through the negligence of the attorney: *Eccles v. Stephenson*, *Crooker v. Hutchinson*, *Cox v. Sullivan*, just cited. The client must show that he had a valid claim: *Spiller v. Davidson* (1849), 4 La. An. 171; *Pennington v. Yell* (1850), 11 Ark. 212.

An attorney is liable to his client only for the proximate results of neglect in making collections. If, after the client took the business from the hands of the attorney, loss resulted from further delay of the client, or of another attorney, into whose hands the collections were given, the first attorney cannot be held responsible for such loss: *Read v. Patterson* (1883), 11 Lea (Tenn.) 430. An attorney liable for a debt lost by his negligence, is not liable for the loss of the evidence of the debt, and in a suit against him for such loss, he may show that the plaintiff had another remedy, which he has successfully pursued: *Huntington v. Rumnill* (1809), 3 Day (Conn.) 390. The amount of damages is a question for the jury: *Godfrey v. Jay* (1831), 5 Moo. & P. 284;

Crooker v. Hutchinson (1824), 2 D. Chip. (Vt.) 117; *Eccles v. Stephenson* (1814), 3 Bibb (Ky.) 517. That the plaintiff continued to employ him after knowing of such negligent conduct, is evidence on the question of damages: *Derrickson v. Cady* (1847), 7 Pa. 27.
JOHN D. LAWSON.

Supreme Court of Pennsylvania.

BULLITT ET AL. v. BAIRD.

Error to the District Court for the City and County of Philadelphia.

READ, J., May 5, 1870. The defendants received for collection from King & Baird, a claim against F. Saler, St. Louis, Missouri, for which they gave a receipt in these words:—

“Philadelphia, May 24th, 1862. Received, to be forwarded for collection according to our discretion, and proceeds, when received by us, to be paid over to King & Baird. Against F. Saler, \$3490.12. (Signed) Bullitt & Fairthorne, per Theo. D. Rand.”

Written across the receipt were these words: “N. B. The owner of the within mentioned taking all risks of the mail, of losses by failure of agents to remit, and also of losses by reason of insurrection or war.” This, it will be recollected, was during the rebellion, and when Missouri was often made the battle ground.

The claim was duly transmitted for collection to Clark & Allen, attorneys in St. Louis, who were proved to be proper and suitable persons for the purpose. Correspondence was duly kept up, and as late as June 21st, 1864, Clark & Allen wrote [that] they had no judgment in King & Baird v. Saler. On the 23d of August, 1864, one of the plaintiffs called and reported he had heard the money had been collected. Defendants immediately wrote to Clark & Allen, who replied, and stated the money had been collected, and promising to remit. This was communicated to the plaintiffs, who read the original letter from Clark & Allen. The defendants received a letter, dated “St. Nicholas Hotel, New York, September 6th, 1864.” (This was Tuesday.) “Gentlemen:—I will be in your city this or the forepart of next week. The claim of King & Baird v. Saler has been paid, *i.e.*, compromised. Yours truly, Wm. Bliss Clark.”

And also another letter, dated “New York, September 13, 1864” (also Tuesday). “Gentlemen:—I will not be in your city before Thursday night. Yours truly, Wm. Bliss Clark.”

He never came, and the next news was that he had fallen dead in the street in St. Louis, utterly insolvent. The witness could not recollect whether he communicated these letters to the plaintiffs, or not.

The learned Judge, in his charge to the jury, said: “So far as negligence goes, I do not see anything but this information from New York, which was not communicated. The information that he was in New York, the letters written from there, and the fact that he did not come, as promised, do not appear to have been communicated. It is for you to say if there was negligence on the part of defendants in reference to this.”

This, therefore, was the only negligence, if any, and the natural question is, if this information had been communicated, would it have saved the debt due by

Clark & Allen, or any part of it? From what we know, it would probably not have saved one dollar; and, therefore, the measure of damages stated in the plaintiff's print, and affirmed by the Court, which is in these words: "And the measure of damages is the amount received by said Clark, together with interest thereon, from the date of such receipt, unless reduced by the evidence offered by the defendants," is clearly erroneous, and the fourth assignment of error is sustained.

Judgment reversed and a *venire de novo* awarded.

Court of Appeals of New York.

STONE v. DRY-DOCK, E. B. & B. RY. CO.

Where a car driver so negligently drives in a city street as to run over a child of seven years of age, the jury should find whether child was capable of exercising sufficient judgment so as to be chargeable with contributory negligence.

The Court will decide that a child of very tender years has not sufficient judgment; but, from the nature of the case, it is impossible to prescribe a fixed period when a child has such sufficient judgment as to be guilty of contributory negligence. A nonsuit, on the ground of contributory negligence, is erroneous, and judgment below (opinion in 46 Hun. 184) is reversed.

Appeal from the Supreme Court, General Term, First Department. (46 Hun. 184.)

Adolph L. Sawyer, Esq., for appellant.

Messrs. Robinson, Scribner & Bright, for defendant.

ANDREWS, J., June 4, 1889. The nonsuit was placed on the ground that an infant, seven years of age, was *sui juris*, and that the act of the child, in crossing the street in front of the approaching car, was negligence on her part which contributed to her death, and barred a recovery. We think the case should have been submitted to the jury. The negligence of the driver of the car is conceded. His conduct in driving rapidly along Canal street at its intersection with Orchard street, without looking ahead, but with his eyes turned to the inside of the car, was grossly negligent: *Mangam v. R. R. Co.* (1868), 38 N. Y. 455; *R. R. Co. v. Gladmon* (1872), 15 Wall. (82 U. S.) 401.

It cannot be asserted, as a proposition of law, that a child, just passed seven years of age, is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*: *Kunz v. City of Troy* (1887), 104 N. Y. 344.

Infants, under seven years of age, are deemed incapable of committing crime, and, by the common law, such incapacity presumptively continues until the age of fourteen. An infant, between those ages, was regarded as within the age of possible discretion; but, on a criminal charge against an infant between those years, the burden was upon the prosecutor to show that the defendant had intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent: 1 Archb. Crim. Pr. & Pl. 11. The Penal Code preserves the rule of the common law, except that it fixes the age of twelve, instead of fourteen, as the time when the presumption of incapacity ceases: Penal Code, §§ 18, 19.

In administering civil remedies, the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. It has been said in one case that an infant, three or four years of age, could not be regarded as *sui juris*, and the same was said, in another case, of an infant five years of age: *Mangam v. R. R. Co.*, *supra*; *Fallon v. R. R. Co.* (1876), 64 N. Y. 13. On the other hand, it was said in *Cosgrove v. Ogden* (1872), 49 N. Y. 255, that a lad, six years of age, could not be assumed to be incapable of protecting himself from danger in streets or roads; and, in another case, that a boy of eleven years of age was competent to be trusted in the streets of a city: *McMahon v. Mayor* (1865), 33 N. Y. 642. From the nature of the case, it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These, and other circumstances, may enter into the question. It becomes, therefore, a question of fact for the jury, where the inquiry is material, unless the child is of so very tender years that the Court can safely decide the fact.

The trial Court misapprehended, we think, the case of *Wendell v. R. R. Co.* (1883), 91 N. Y. 420, in supposing that it decided, as a proposition of law, that a child of seven years was capable of exercising judgment, so as to be chargeable with contributory negligence. It was assumed in that case, both on the trial and on appeal, that the child whose conduct was

in question was capable of understanding, and did understand, the peril of the situation, and the evidence placed it beyond doubt that he recklessly encountered the danger which resulted in his death. The boy was familiar with the crossing, and, eluding the flagman, who tried to bar his way, attempted to run across the track in front of an approaching train in plain sight, and unfortunately slipped and fell, and was run over and killed. It appeared that he was a bright, active boy, accustomed to go to school and on errands alone, and sometimes was intrusted with the duty of driving a horse and wagon, and that on previous occasions he had been stopped by the flagman, while attempting to cross the track in front of an approaching train, and had been warned of the danger. The Court held, upon this state of facts, that the boy was guilty of culpable negligence. But the case does not decide, as matter of law, that all children, of the age of seven years, are *sui juris*.

We are inclined to the opinion that, in an action for an injury to a child of tender years, based on negligence, who may or may not have been *sui juris* when the injury happened, and the fact is material, as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as matter of fact, of exercising judgment and discretion. This rule would seem to be consistent with the principle, now well settled in this State, that in an action for a personal injury, based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action.

In the present case, the only fact before the jury, bearing upon the capacity of the child whose death was in question, was, that she was a girl seven years and three months old. This, we think, did not alone justify an inference that the child was incapable of exercising any degree of care. But, assuming that the child was chargeable with the exercise of some degree of care, we think it should have been left to the jury to determine whether she acted with that degree of prudence which might reasonably be expected, under the circumstances, of a child of her years. This measure of care is all that the law exacts in such a case: *Thurber v. R. R. Co.* (1875), 60 N. Y. 335. The child was lawfully in the street. In attempting to

cross, she was struck by the horse on the defendant's car, and was run over and killed. The evidence would have justified the jury in finding that, when the child stepped down from the curbstone, the car was fifty or more feet away, and the distance from the curbstone to the track of the defendant's road was less than twelve feet. The child, if she saw the car, might very well have supposed that she could get over the track before the car passed. There is evidence that the speed of the car was increased at about the time the child started to cross. It would be very unjust to exact of such a child that degree of care which an adult would exercise under similar circumstances. It was, we think, for the jury to say whether the child's conduct was unusual or unnatural for a child of her years. She probably did not appreciate the rapidity of movement of the car; nor could it be expected that she would weigh the circumstances, or fully understand the danger of attempting to cross in front of the car. The negligence of the defendant's driver is conceded, and it was for the jury to judge whether the conduct of the child, in crossing the street to join another child, engaged in roller-skating on the opposite side, was characterized by any want of that degree of care which children under similar circumstances would usually exercise. There is no question in the case, of negligence on the part of the parent of the child. That point was not presented on the motion for nonsuit. The judgment should be reversed, and a new trial granted.

All concur.

The right of children to play on the sidewalk and street, is not settled.

It is nowhere disputed that children *sui juris* have as much right on the sidewalks and streets as adults, and the same may be said of children *non sui juris*, in charge of a proper person. But the right to use the sidewalks and street for the purpose of travel is quite different from the use for the purpose of play.

A careful analysis of the decisions will exhibit that there is a distinction

between children *sui juris* and children *non sui juris*.

In cases of injury to children *non sui juris*, the doctrine of imputable negligence has, in some jurisdictions, been applied. In cases of injury to children *sui juris*, some courts have applied this doctrine, and others have applied the rule of contributory negligence, without regard to the doctrine of imputable negligence.

It is proposed to establish the proposition, that all children, *sui juris* or *non*

sui juris, have the right to play on the sidewalk and street, and if injury to them can be avoided by the exercise of due care, such care must be used, and for want of such care the defendant is liable, whether there was, or was not, imputable negligence, or contributory negligence.

The first obstacle to this proposition is the doctrine of imputable negligence; which is, that a child *non sui juris* has no right on the sidewalk, or street, unaccompanied by a proper person. This was first announced in *Hartfield v. Roper* (1839), 21 Wend. (N. Y.) 615. From the reasoning in this case, and others which follow it, especially *Mungam v. R. R.* (1868), 38 N. Y. 455, this doctrine is properly limited to children of "two or three years of age, or even more," who are, what may be termed, helpless, and require the care and protection of another. To this class the doctrine of *Hartfield v. Roper* is, that if run down or injured by a traveler, the traveler is not liable, because it was negligence in the parent for a child of this age to be on the street, and it made no difference how the child got on the street alone, it being sufficient that he was there.

In other words, a child of "two or three years or even more" on the street alone, can be run down or injured with impunity.

Now it is conceded by the courts which enforce this doctrine that a child of these years is devoid of all sense of danger; and yet the same courts approve the principle that an animal must not be thus run down, or injured, if it can be avoided by the exercise of due care. This is the law of *Davies v. Mann* (1842), 10 M. & W. 546 [a donkey case]; *Mayor of Colchester v. Brooke* (1845), 7 A. & E. (N. S.) 377 [an oyster case]; *Townsend v. Wathen* (1808), 9 East 277 [a dog case].

Logically, the syllogism is, that all

beings and animals devoid of the sense of danger must not be injured, if it can be avoided by the exercise of due care. A child of two or three years of age is such a being, therefore, such a child must not be injured, if it can be avoided by the exercise of due care. The logic of the doctrine in *Hartfield v. Roper* is that a child, devoid of the sense of danger, can be run down without the exercise of due care. This doctrine is therefore illogical, and barbarous, and the proper principle is that such a child must not be injured, if it can be avoided by the exercise of due care; which is the same as stating the general and sensible rule that a defendant is liable for any injury caused by his want of due care.

The senseless judicial jugglery of *Hartfield v. Roper* obtains in nine States of the Union:—

California,—*Schierhold v. R. R.* (1871), 40 Cal. 447; *Meeks v. R. R.* (1878), 52 Id. 602; *s. c.* (1880), 56 Id. 513.

Illinois,—*Gavin v. Chicago* (1880), 97 Ill. 66; *Toledo, W. & W. R'y Co. v. Grable* (1878), 88 Id. 441; [*City of Chicago v. Starr* (1866), 42 Id. 174, repudiated in *City of Chicago v. Keefe* (1885), 114 Id. 222; *Stafford v. Rubens* (1885), 115 Id. 196; *City of Chicago v. Hesing* (1876), 83 Id. 204; *Kerr v. Forgue* (1870), 54 Id. 482; *Chicago, St. L. & P. R. R. Co. v. Welsh* (1886), 118 Id. 572.]

Indiana,—*Evansville & C. R. R. Co. v. Wolf* (1877), 59 Ind. 89; *Jeff. M. & Ind. R. R. Co. v. Bowen* (1872), 40 Id. 545; [*City of Indianapolis v. Emmelman* (1886), 108 Id. 530; *Mayhew v. Burns* (1885), 103 Id. 328.]

Kansas,—*Atch. T. & S. F. R. R. Co. v. Smith* (1882), 28 Kan. 541.

Maine,—*Brown v. E. & N. A. R'y Co.* (1870), 58 Me. 384; *Lislie v. City of Lewiston* (1873), 62 Id. 468; [*Stin-*

son v. *City of Gardner* (1856), 42 Id. 248; *McCarthy v. City of Portland* (1878), 67 Id. 167.]

Maryland,—*McMahon v. R. R. Co.* (1873), 39 Md. 438; *Baltimore C. P. Ry Co. v. McDonnell* (1875), 43 Id. 551.

Massachusetts,—*Lynch v. Smith* (1870), 104 Mass. 52; *Gibbons v. Williams* (1883), 135 Id. 333; [*Collins v. S. B. H. R. R. Co.* (1886), 142 Id. 301; *Blodgett v. City of Boston* (1864), 8 Allen (Mass.) 237; *Tighe v. City of Lowell* (1876), 119 Mass. 472; *Lyons v. Inhab. Brookline* (1876), Id. 491; *Hunt v. City of Salem* (1876), 121 Id. 294.]

Minnesota,—*Fitzgerald v. R. R. Co.* (1882), 29 Minn. 336.

New York,—*Ihl v. R. R. Co.* (1872), 47 N.Y. 323; *Cosgrove v. Ogden* (1872), 49 Id. 255; [*Kuns v. City of Troy* (1887), 104 Id. 344; *McGarry v. Loomis* (1875), 63 Id. 104; *McGuire v. Spence* (1883), 91 Id. 303, 306; *O'Mara v. R. R. Co.* (1868), 38 Id. 445; *Mangan v. R. R. Co.* (1868), 38 Id. 455; *Fallon v. R. R. Co.* (1876), 64 Id. 13; *Barry v. R. R. Co.* (1883), 92 Id. 289; *Thurber v. R. R. Co.* (1875), 60 Id. 326; *Mullany v. Spence* (1874), 15 Abb. Pr. N. S. (N. Y.) 319; *Pendergast v. R. R. Co.* (1874), 58 N. Y. 652; *Ryder v. The Mayor* (1884), 50 N. Y. Super. 221; *Birkett v. Ice Co.* (1888), 110 N. Y. 504; *Malone v. R. R. Co.* (1889), 51 Hun (N. Y.) 532; *Murphy v. Orr* (1884), 96 N. Y. 14; *Burker v. Savage* (1871), 45 Id. 191; *Weil v. Dry Dock, E. B. & B. R. Co.*, S. Ct. N. Y. City, General Term, June 28, 1889; *Henderson v. Knickerbocker I. Co.*, S. Ct., General Term, 1st Dept., May 24, 1889.]

The doctrine of *Hartfield v. Roper* has been repudiated in ten States of the Union:—

Alabama,—*Government S. R. R. Co. v. Hanlon* (1875), 53 Ala. 70; *Bay*

Shore R. R. Co. v. Harris (1880), 67 Id. 6.

Connecticut,—*Bronson v. Town of Southbury* (1870), 37 Conn. 199; *Birge v. Gardiner* (1849), 19 Id. 507.

Missouri,—*Frick v. R. R. Co.* (1882), 75 Mo. 542; [*Donahoe v. R. R. Co.* (1884), 83 Id. 543.

Nebraska,—*Huff v. Ames* (1884), 16 Neb. 139.

Ohio,—*Bellefontaine & I. R. R. Co. v. Snyder* (1868), 18 Ohio St. 399; *C. C. & I. R. R. Co. v. Manson* (1876), 30 Id. 451; *Street Ry. Co. v. Eadie* (1885), 43 Id. 91.

Pennsylvania,—*N. Pa. R. R. Co. v. Mahoney* (1868), 57 Pa. 187; *P. & R. R. Co. v. Long* (1874), 75 Id. 257.

Tennessee,—*Whirley v. Whiteman* (1858), 1 Head (Tenn.) 610.

Texas,—*G. H. & H. Ry. Co. v. Moore* (1883), 59 Tex. 64; *T. M. Ry. Co. & M. N. C. Co. v. Herbeck* (1884), 60 Id. 602.

Vermont,—*Robinson v. Cone* (1850), 22 Vt. 213.

Virginia,—*Norfolk & P. R. R. Co. v. Ormsby* (1876), 27 Grat. (Va.) 455.

In the jurisdictions which assumed to adopt the rule in *Hartfield v. Roper*, subsequent decisions have so materially limited the doctrine that there does not seem to be much of it left.

In *McGarry v. Loomis* (1875), 63 N. Y. 104, it was announced that the doctrine of imputable negligence does not apply, if the child has not been negligent, and that children have a right to play on the sidewalk. In this case the defendant was held liable, because he was guilty of negligence in causing a pool of hot water, near the sidewalk, and so liable, irrespective of the question whether or not the parent was negligent in allowing a child, four years of age, to play on the sidewalk, knowing the existence of the pool of hot water, and that the child having the right to play on the sidewalk, it was not negligence to play

near a pool of water, because of its age it was not sensible of the danger. This case is therefore nothing more than the assertion of the major premise above stated, that a defendant is liable for injury to children devoid of the sense of danger, when that injury is caused by the defendant's want of due care, and that it was a want of due care to cause a pool of hot water near a sidewalk. As will be hereafter shown, this is the doctrine pervading the adjudications in cases of injuries to children occurring elsewhere than on the sidewalk. This principle was approved and adopted in *McGuire v. Spence* (1883), 91 N. Y. 306; *O'Mara v. R. R.* (1868), 38 Id. 445; *Mangam v. R. R.* (1868), 38 Id. 455; *Fallon v. R. R.* (1876), 64 Id. 13; *Barry v. R. R.* (1883), 92 Id. 289; *Thurber v. R. R. Co.* (1875), 60 Id. 326; *Mullany v. Spence* (1874), 15 Abb. Pr. N. S. (N. Y.) 319; *Pendergast v. R. R.* (1874), 58 N. Y. 652; *Ryder v. The Mayor* (1884), 50 N. Y. Super. 221; *Birkett v. Ice Co.* (1888), 110 N. Y. 504.

But, to be more specific, it has been held that in an action for injury to a child *non sui juris* (and, *a priori*, injury causing death), the defendant was held liable, because the engineer did not stop the train, or check its speed, upon notice of the danger to the child, which due care required, and which would have avoided the injury: *Donahue v. R. R.* (1884), 83 Mo. 543; *Phila. & R. R. Co. v. Long* (1874), 75 Pa. 257.

Because the defendant left water-pipe piled up in the street, so loose that the child, while playing upon them, was killed: *Stafford v. Reubens* (1885), 115 Ill. 196. Because the defendant caused a ditch near the sidewalk, into which the child fell and was drowned: *Chicago v. Hesing*, 83 Ill. 204. Because the defendant did not remove, as was its duty, a large, heavy counter, placed on the sidewalk, tilted in such a manner

as to be easily thrown down: *Kans v. City of Troy* (1887), 104 N. Y. 344. In this case the Court stated that a child *non sui juris* cannot be guilty of negligence, and that *sui juris* means of sufficient discretion to understand the danger. The defendant was liable because he put the counter on the street, which caused the injury, although it would not have fallen had the child not attempted to jump on it: *Kerr v. Forgue* (1870), 54 Ill. 482.

Because the driver of the street car was not watching for pedestrians, which was his duty: *Idl v. R. R.* (1872), 47 N. Y. 317. Because the driver could have stopped the car in time to prevent the injury, had he been on the lookout, as was his duty: *Thurber v. R. R. Co.* (1875), 60 Id. 326. Because the driver was not sufficiently vigilant and careful, for, if he had been, "he would have seen the child in time to avoid injuring her": *Birkett v. Ice Co.* (1888), 110 N. Y. 504.

Because the city left the excavation unguarded and unfenced: *Ryder v. The Mayor* (1884), 50 N. Y. Super. 221.

Because the city did not keep the sidewalk in a reasonably safe state of repair: *City of Chicago v. Keefe* (1885), 114 Ill. 222, which repudiates *City of Chicago v. Starr* (1866), 42 Id. 174.

The converse of the position of the foregoing cases is illustrated by the following, where it was held that the defendant was not liable because he committed no negligence, or rather omitted no duty, inasmuch as the child would not have been drowned had the plaintiff repaired, or caused to be repaired, or guarded, the excavation of which he had full notice: *Mayhew v. Burns* (1885), 103 Ind. 343. Because the defendant was carrying on its own business upon its own property without the omission of any duty, and thus had no reason to apprehend that a child, three and one-half years of age, would come up on

its track, in such a place, and in front of a slowly moving freight: *Malone v. R. R.* (1889), 51 Hun (N. Y.) 532. Because the fault rested with those who had charge of the child, and the defendant was without fault: *The Burgundia* (1886), U. S. D. Ct., S. Dist. N. Y., 29 Fed. Repr. 464.

This is the principle upon which all the cases are based, except in Massachusetts and Maine, in cases against municipal corporations, because their liability is limited by statute: *Blodgett v. City of Boston* (1864), 8 Allen (Mass.) 237; *Stinson v. City of Gardiner* (1856), 42 Me. 248; *McCarthy v. City of Portland* (1878), 67 Id. 167; *Tighe v. City of Lowell* (1876), 119 Mass. 472; *Lyons v. Inhab. Brookline* (1876), Id. 491; *Hunt v. City of Salem* (1876), 121 Id. 294; yet the New Hampshire Court, under a similar law, criticises the principle sought to be applied by these cases: *Varney v. Manchester* (1878), 58 N. H. 430, 434.

No adjudication discovered by the writer, after a laborious research, has announced any rule or principle, by which the right of children to be and to play upon the sidewalk and street, is governed or controlled. The majority of the cases have gone off on the minor, or subsidiary question, of whether or not the parent has been guilty of negligence; and others, upon the question whether or not the child, though *non sui juris*, has been guilty of negligence; while the minority of the cases place the ruling upon the principle contended for, yet, through all the cases, may be found the proposition that, with respect to children under the age of adult discretion, the defendant should be held liable, if he has failed in any duty.

The rule announced is enforced by the application of fundamental principles:

First. The sidewalk and street is for the use of all persons, children as well as adults, as a matter of right.

Second. In the exercise of one's own right, he must take due care not to interfere with the rights of others, and if he uses any agency or power in the exercise of this right, such as driving a horse, he must use the vigilance and care commensurate with the agency employed, and is therefore liable for any interference with another's right, if it could be avoided by the exercise of due care: *Murphy v. Orr* (1884), 96 N. Y. 14; *Barker v. Savage* (1871), 45 Id. 191.

Third. Children are required to exercise only such care and prudence as may reasonably be expected from their age and the circumstances of the case; the question being, did the child have the capacity to properly anticipate the danger and guard against it, the defendant being without fault; which is nothing more than the rule in *Lynch v. Nurdin* (1841), 1 A. & E. (N. S.) 29; *R. R. Co. v. Stout* (1873), 17 Wall. (84 U. S.) 657; *Gray v. Scott* (1870), 66 Pa. 345; *Robinson v. Crne* (1850), 22 Vt. 213; *Lynch v. Smith* (1870), 104 Mass. 52; *Mulligan v. Curtis* (1868), 100 Id. 512; *Hicks v. R. R. Co.* (1877), 64 Mo. 430; *R. R. Co. v. Gladman* (1872), 15 Wall. (82 U. S.) 40; *Kay v. R. R. Co.* (1870), 65 Pa. 269; *Manly v. R. R.* (1876), 74 N. C. 655; *Mobile & M. Ry. Co. v. Crenshaw* (1880), 65 Ala. 566; *Barry v. R. R. Co.* (1883), 92 N. Y. 289; *Byrne v. R. R. Co.* (1881), 83 N. Y. 620; *Houston & T. C. Ry. Co. v. Simpson* (1883), 60 Tex. 103; *G. H. & H. Ry. Co. v. Moore* (1883), 59 Tex. 64; *Plumley v. Birge* (1878), 124 Mass. 57; *Meibus v. Dodge* (1875), 38 Wis. 300; *Chicago & N. W. Ry. Co. v. Smith* (1881), 46 Mich. 504.

Fourth. Parents are required to exercise such care as the circumstances of the case and their circumstances in life permit, which, being a question of fact, is for the jury: *Isabel v. R. R. Co.* (1875), 60 Mo. 475; *Walters v. R. R.*

Co. (1875), 41 Iowa 71; *Pittsburg, A. & M. Ry. Co. v. Pearson* (1872), 72 Pa. 169; *P. & R. R. Co. v. Long* (1874), 75 Id. 257; *Glassy v. R. R. Co.* (1868), 57 Id. 172; *O'Flaherty v. R. R. Co.* (1869), 45 Mo. 70; *Kay v. R. R. Co.* (1870), 65 Pa. 269.

Fifth. A higher degree of care must be exercised towards children, than towards adults: *P. & R. R. Co. v. Spearen* (1864), 47 Pa. 300; *Smith v. O'Connor* (1864), 48 Id. 218; *P. R. Co. v. Morgan* (1876), 82 Id. 134; *Isabel v. R. R. Co.* (1875), 60 Mo. 475; *C. B. & Q. R. R. Co. v. Dewey* (1861), 26 Ill. 259; *Bannon v. R. R. Co.* (1865), 24 Md. 108; *Walters v. R. R. Co.* (1871), 41 Iowa 71; *O'Mara v. R. R. Co.* (1868), 38 N. Y. 445; *Singleton v. Ry. Co.* (1859), 7 C. B. (N. S.) 287. Because an adult has legal discretion and a child has not; hence due care means the degree of care in proportion to the capacity of the child to anticipate the danger and guard against it; and therefore, due care as to adults, would be gross negligence as to children: *Robinson v. Cone* (1850), 22 Vt. 213; *Pittsburg A. & M. R. R. Co. v. Caldwell* (1873), 74 Pa. 421; *Lucas, Adm'r, v. R. R. Co.* (1856), 6 Gray (Mass.) 71; *Kerr v. Forgue* (1870), 54 Ill. 484; *Brannon v. R. R. Co.* (1877), 45 Conn. 284; *Walters v. R. R. Co.* (1875), 41 Iowa 71; *East Saginaw Ry. Co. v. Bohn* (1873), 27 Mich. 503; *Kenyon v. R. R. Co.* (1875), 5 Hun (N. Y.) 479; *T. & P. Ry. Co. v. O'Donnell* (1882), 58 Tex. 27; *G. C. & S. F. Ry. Co. v. Evansick* (1884), 61 Id. 3.

Now if children, *sui juris* or *non sui juris*, have a right on the sidewalk and street (and the adjudications have modified *Hartfield v. Roper* to this extent: *McGarry v. Loomis* (1875), 63 N. Y. 104; *Karr v. Parks* (1879), 40 Cal. 188; *Mangam v. R. R. Co.* (1868), 38 N. Y. 455; *Jetter v. R. R. Co.* (1866), 2 Keyes (N. Y.) 154; *O'Flaherty v.*

R. R. Co. (1869), 45 Mo. 70; *Cosgrove v. Ogden* (1872), 49 N. Y. 255; *Schierhoed v. R. R. Co.* (1871), 40 Cal. 447; *Drew v. R. R. Co.* (1862), 26 N. Y. 49; *Lynch v. Smith* (1870), 104 Mass. 52; *Ihl v. R. R. Co.* (1872), 47 N. Y. 317; *East Saginaw Ry. Co. v. Bohn* (1873), 27 Mich. 503; *Bellefontaine & I. R. Co. v. Snyder* (1868), 18 Ohio St. 399; *McMahon v. R. R. Co.* (1873), 39 Md. 438; *Mulligan v. Curtis* (1868), 100 Mass. 512); then it is immaterial whether the child is there through the negligence of the parents or not. Being on the sidewalk by right, and only required to exercise the care commensurate with its age and discretion, and the defendant compelled to exercise a higher degree of care towards children than to adults, it follows that, as to children devoid of the sense of danger, or incapable of anticipating danger and guarding against it, there can be no contributory negligence, and the rule is that the defendant is liable, if he could have avoided the injury by the exercise of due care. This the courts have asserted in modification of the rule (in *Hartfield v. Roper*): *Baltimore C. P. Ry. Co. v. McDonnell* (1875), 43 Md. 556; *McMahon v. R. R.* (1873), 39 Id. 439; *Barksdull v. R. R. Co.* (1871), 23 La. An. 180, which is substantially the rule in *Davies v. Mann* (1842), 10 M. & W. 546, that if a traveler can, by the exercise of ordinary care, avoid doing an injury to something exposed in the highway, he is bound to do it. If such a child is injured, notwithstanding the exercise of due care on the part of the defendant, then there is no cause of action. The child did not contribute, because it was incapable of contributing; the defendant is not liable, because he committed no breach of duty.

In such cases, the sole question is, did the defendant fail to exercise due care? and this the weight of the authorities approve: *Robinson v. Cone* (1850), 22

Vt. 213; *N. P. R. R. Co. v. Mahony* (1868), 57 Pa. 187; *P. R. R. Co. v. Kelly* (1858), 31 Id. 372; *Rauch v. Lloyd* (1858), Id. 358; *P. & R. R. Co. v. Spearen* (1864), 47 Id. 300; *Smith v. Connor* (1864), 48 Id. 218; *Glassey v. R. R. Co.* (1868), 57 Id. 172; *Kay v. R. R. Co.* (1870), 65 Id. 269; *P. & R. R. Co. v. Long* (1874), 75 Id. 257; *Gov. S. R. R. Co. v. Hanlon* (1875), 53 Ala. 70; *Bellefontaine & I. R. R. Co. v. Snyder* (1868), 18 Ohio St. 399; *C. C. C. & I. R. R. Co. v. Manson* (1876), 30 Id. 451; *Norfolk & P. R. R. Co. v. Ormsby* (1876), 27 Grat. (Va.) 455; *Birge v. Gardner* (1849), 19 Conn. 507; *Daley v. R. R.* (1858), 26 Id. 591; *Bronson v. Town of Southbury* (1870), 37 Id. 199; *Boland v. R. R. Co.* (1865), 36 Mo. 484; *Stillson v. R. R. Co.* (1878), 67 Id. 671; *Frick v. R. R. Co.* (1882), 75 Id. 542; *Huff v. Ames* (1884), 16 Neb. 139; *Whirley v. Whiteman* (1858), 1 Head (Tenn.) 610; *G. H. & H. Ry. Co. v. Moore* (1883), 59 Tex. 64; *T. & P. Ry. Co. v. O'Donnell* (1882), 58 Id. 27; *H. & T. C. Ry. Co. v. Simpson* (1883), 60 Id. 103; *T. M. Ry. Co. et al. v. Herbeck* (1884), 60 Id. 602.

According to the adjudications, this rule does not apply to children injured by the negligence of the parent, while in the actual custody and control of such parent: *N. P. R. R. Co. v. Mahony* (1868), 57 Pa. 187; *Holly v. Gas Co.* (1857), 8 Gray (Mass.) 123; *Pittsburg, A. & M. R. R. Co. v. Caldwell* (1873), 74 Pa. 421; *Bellefonte & I. R. R. Co. v. Snyder* (1868), 18 Ohio St. 399; *East Saginaw C. Ry. Co. v. Bohn* (1873), 27 Mich. 503; *Stillson v. R. R. Co.* (1878), 67 Mo. 671; *Lannen v. Gas Co.* (1865), 46 Barb. (N.Y.) 264; *R. R. v. Stratton*, 76 Ill. 38; *Carter v. Towne* (1868), 98 Mass. 567; *Morrison v. R. R. Co.* (1874), 56 N. Y. 302; though it is difficult to understand what inherent reason can exist for excusing a defendant who

has committed a breach of duty, because the parent was negligent, notwithstanding the injury would not have occurred had the defendant exercised due care.

With respect to children *sui juris*, the rule in *Lynch v. Nardin*, and not the rule applicable to children *non sui juris*, applies, because they are capable of exercising discretion, and of recognizing danger and providing against it, but only in proportion to their age and prudence.

As stated above, a higher degree of care must be used towards children than adults, because of the smaller degree of judgment and discretion possessed by children; hence, if ordinary care is required with respect to adults, it follows that extraordinary care must be exercised towards children, and, therefore, the sole question would be, did the defendant exercise this due care? If he did not, he should be held liable. If he did, he is not liable. If, on the one hand, the child is only required to exercise the care which may be expected from his age and intelligence, and, on the other, the defendant must exercise extraordinary care—or a higher degree of care than ordinary care—it is difficult to understand why a defendant who has failed to exercise the care which the law demands, and thereby caused the injury, should be exempt from liability, when a child, capable of exercising childish care, has failed or forgotten to use that care. As a matter of reason and nature, the omission of a child to exercise childish care, ought not to be allowed to excuse the want of due care in an adult.

The rule in *Lynch v. Nardin* does not extend to the question whether, or not, the child exercised the care expected from one of his age and judgment, but is based entirely upon the question, Did the defendant exercise due care? Hence, due care required

him not to leave his horse and cart unhitched and unattended in the street, where children might get hurt by playing with or about it: *Lynch v. Nardin* (1841), 1 A. & E. (N. S.) 29; *Clark v. Chambers* (1878), L. R., 3 Q. B. Div. 327.

And that he do not leave his turntables unguarded and unlocked in a place likely to attract children, even upon his own ground: *R. R. Co. v. Stout* (1873), 17 Wall. (84 U. S.) 657; s. c. 2 Dill. (U. S. C. Ct., Dist. Neb.) 294.

Nor leave a tilted bulkhead so exposed on the sidewalk, that a child may throw it over and suffer injury: *Birge v. Gardner* (1849), 19 Conn. 507.

Nor pile lumber in such a place, and in such a way, as to fall on children should they play upon it: *Cosgrove v. Ogden* (1872), 49 N. Y. 255; *McAlpin v. Powell* (1878), 55 How. Pr. (N. Y.) 163; *Venderbeck v. Hendry* (1871), 34 N. J. L. 467.

Nor use dangerous or hazardous instrumentalities, exposed where children may get at them: *Boland v. R. R. Co.* (1865), 36 Mo. 484; *Wood v. School Dist.* (1876), 44 Iowa 27; *Lyons v. Inhab. Brookline* (1876), 119 Mass. 491; *Kerr v. Forgue* (1870), 54 Ill. 482; *Keffe v. R. R. Co.* (1875), 21 Minn. 207; *Nagle v. R. R. Co.* (1882), 75 Mo. 653; *Kansas C. Ry. Co. v.*

Fitzsimmons (1879), 22 Kan. 686; *Koons v. R. R. Co.* (1877), 65 Mo. 592.

Nor expose on his premises, or where children may, or are, likely to resort, or be attracted, any dangerous tool, or machine, or contrivance: *Stout v. Sioux City & P. R. R. Co.* (1872), U. S. C. Ct., Dist. Neb., 2 Dill. 294; *R. R. Co. v. Stout* (1873), 17 Wall. (84 U. S.) 657; only questioned in *St. L. V. & T. H. R. R. Co. v. Bell* (1876), 81 Ill. 76; *McAlpin v. Powell* (1877), 70 N. Y. 126; and rejected in *Lane v. Atlantic Works* (1872), 111 Mass. 136; *Hughes v. Macfie* (1863), 2 H. & C. 744; *Mangan v. Atterton* (1866), L. R. 1 Ex. 239.

This proper rule has been carried so far that, where children were injured while playing on a railroad track, the defendant was held liable if the injury could have been avoided: *Morrissey v. R. R. Co.* (1879), 126 Mass. 377; *Eckert v. R. R. Co.* (1871), 43 N. Y. 502; *Central Br. U. P. R. R. Co. v. Henigh* (1880), 23 Kan. 347; *Smith v. R. R. Co.* (1881), 25 Id. 738.

In conclusion, it is believed to be the rule that, for injuries to children, *sui juris* or *non sui juris*, while on the sidewalk or street, whether at play or not, to hold the defendant liable, if he has failed to exercise the care required, irrespective of any other question.

JOHN F. KELLY.

St. Paul, Minn.

*Supreme Court of Illinois.*PATRICK J. SEXTON, *Appellant*,

v.

CHICAGO STORAGE CO. ET AL., *Appellees*.

A transfer by a tenant, of the demised premises, for the unexpired residue of his term, is an assignment, making the assignee liable to the original lessor for rent, though the instrument of transfer purports to be a lease, reserves a different rent from that specified in the original lease, with right of re-entry and forfeiture for non-payment, and provides for surrender of the premises to the original lessee.

The fact that the original lessor has refused to release his lessee from liability for rent, and to accept the rent reserved in the assignment, does not estop him from treating the transfer as an assignment.

That an assignment of a lease was made without the written assent of the lessor, in violation of the provisions of the lease, is no defence to a suit by the lessor against the assignee for rent.

Appeal from Appellate Court, first district.

On May 1, 1885, Patrick J. Sexton leased to Frank F. Cole, by two separate leases, for different parts of the building, a certain warehouse in Chicago, for the term of three years, at a rent of \$466.66 per month. Nine days later Cole leased this warehouse to the Chicago Storage Company, for the whole of his unexpired term, at a rental of \$300 per month for the first year, \$500 per month for the second year, and \$650 per month for the third year, with right of re-entry and forfeiture for non-payment of rent, and a covenant by the company to surrender possession to him, at the expiration of the term, or sooner determination of the lease. Sexton treated this second lease as an assignment, demanded rent from the company at the rate of \$466.66 per month, and, on its non-payment, brought this suit against the corporation and its stockholders, to dissolve the corporation for having ceased to do business, leaving debts unpaid. The Superior Court and the Appellate Court both held the conveyance from Cole to the company to be a sub-lease, and dismissed the bill for want of equity, because the defendants were not indebted to complainant.

Alexander S. Bradley (John N. Jewett and Jewett Bros., of counsel), for appellant.

Kenneth R. Smoot and Monk & Elliott, for appellees.

SCHOLFIELD, J., June 15, 1889. The evidence sufficiently proves that "the Chicago Storage Company has ceased doing business." This is not contested by counsel for appellees, though they seek to avoid its effect by the circumstance which they claim to be proved, that such failure is solely because of the seizure and appropriation of its property for the payment of rent due from Frank F. Cole alone to appellant. It is therefore manifest that, in determining whether the corporation has left debts unpaid, so as to bring the case within section 25, c. 32, Rev. Stat. 1874, as amended by the Act of May 22, 1877, in relation to corporations (Laws 1877, p. 66), the first and most important question is, whether the Storage Company is an assignee of the term of Frank F. Cole, or only a sub-lessee under him, for, if it is an assignee of the term of Frank F. Cole, it stands in his shoes as respects his covenant to pay rent, and its property is liable to be seized and appropriated to the payment of the rent by distress, as was done. If, however, it is but a sub-lessee under Frank F. Cole, it is liable only on its covenants to him.

The leases to Frank F. Cole are "for and during" the terms named, "and until the 1st day of May, 1888." The lease executed by Frank F. Cole to the Chicago Storage Company is of precisely the same premises included by the leases to him, and it is in the identical language of those leases, "for and during" the term named, "and until the 1st day of May, 1888;" so that the terms all end at the same instant of time. No space of time, however minute, therefore, can by any possibility remain after the term of the Storage Company has ended before the expiration of the term of Cole, in which he could enter upon or accept a surrender of the premises. The general principle, as held by all the authorities, is that, where the lessee assigns his whole estate, without reserving to himself a reversion therein, a privity of estate is at once created between his assignee and the original lessor, and the latter then has a right of action directly against the assignee, on the covenants running with the land, one of which is that to pay rent; but if the lessee sub-lets the premises, reserving or retaining any reversion, however small, the privity of estate between the sub-lessee and the original landlord is not established, and the latter has

no right of action against the former, there being neither privity of contract nor privity of estate between them. The chief difficulty has been in determining what constitutes such reservation of a reversion. The more recent English decisions, and all of the text-books treating of the question, which have been accessible to us, hold that, where all of the lessee's estate is transferred, the instrument will operate as an assignment, notwithstanding that words of devise, instead of assignment, are used, and notwithstanding the reservation of a rent to the grantor, and a right of re-entry on the non-payment of rent, or the non-performance of the other covenants contained in it: 1 Platt, Leases, 1-9, 102; Woodf., Landl. & Ten. (7th Ed.) 211 (11th Ed.), 236; Wood, Landl. & Ten., p. 181, § 90; Tayl., Landl. & Ten. (8th Ed.) 16, note 2; Bac. Abr. tit. "Leases," H 3; 2 Prest. Conv. 124, 125; *Beardman v. Wilson* (1868), L. R. 4 C. P. 57; *Doe v. Bateman* (1818), 2 B. & Al. 168; *Wollaston v. Hakewill* (1841), 3 Scott, N. R. 593. Undoubtedly many cases may be found wherein the lessee has granted to another party his entire term, retaining no reversionary interest in himself; and it has been held that the relation, as between the parties, was that of landlord and tenant, or, perhaps more correctly, lessee and sub-lessee, because such was clearly the intention of the parties; but this was the result of contract only, and not conclusive upon the original landlord, since he was not a party to it. The relation of landlord and assignee of a term, however, it has been seen, does not result from contract, but from privity of estate, and therefore, when the original lessee has divested himself of his entire term, and thus ceased to be in privity of estate with the original landlord, the person to whom he has transferred that entire term must necessarily be in privity of estate with his original landlord, and hence liable as assignee of the term: See Wood, Landl. & Ten. 182, and authorities cited in note 1; *Van Rensselaer v. Hays* (1839), 19 N. Y. 68; *Pluck v. Digges* (1831), 5 Bligh (N. S.) 31; *Thorn v. Woollcombe* (1832), 3 B. & Ad. 586; *Carpenters' Union v. Railway Co.* (1873), 45 Ind. 281; *Smiley v. Van Winkle* (1856), 6 Cal. 605; *Blumenberg v. Myres* (1867), 32 Id. 93; *Schilling v. Holmes* (1863), 23 Id. 227.

Counsel for appellees contend, and the Courts below ruled

accordingly, that the reservation of a new and different rent, or the reservation to the lessor of the right to declare the lease void for the non-performance of its covenants, and to re-enter for such breach, or at the end of the term, coupled with the covenant of the lessee to surrender at the end of the term or upon forfeiture of the term for breach of covenant, make the letting by the lessee a sub-letting and not an assignment of the term, notwithstanding the lessee has retained in himself no part of the term; and they rely upon *Collins v. Hasbrouck* (1874), 56 N. Y. 157; *Ganson v. Tiff* (1877), 71 Id. 48; *McNeil v. Kendall* (1880), 128 Mass. 245; and *Dunlap v. Bullard* (1881), 131 Id. 161,—as sustaining this contention. There is general language in *Collins v. Hasbrouck* quite as broad as claimed; but no question therein presented called for its use, and its meaning ought to be limited by the facts to which it was applied. There, the first original lease was for the term of 10 years from the 1st of April, 1864; the second was for the term of 9 years from the 1st of April, 1865. Thus both expired April 1, 1874. The sub-lease was for the term of two years and seven months from the 1st of September, 1867,—that is to say, until the 1st of April, 1870,—with the privilege, however, to the lessee to extend the term four years, or until April 1, 1874, by giving two months' notice, etc. The plaintiff claimed that the leases were forfeited by the sub-letting, and the Court so held. No distinction was taken, in the opinion of the Court, between an absolute demise until the end of the term and a mere privilege to have the demise extended four years, which was until the end of the term. We have held that a similar clause in a lease is not a present demise, but a mere covenant, which may be specifically enforced in chancery, or upon which an action at law may be maintained for a breach of covenant: *Hunter v. Silvers* (1853), 15 Ill. 174; *Sutherland v. Goodnow* (1884), 108 Id. 528. And it would seem quite evident that, in no view, could the reversion have passed until after the grantee elected to have the term for four years longer; and so, when the lease was executed, there was still a reversionary interest in the sub-lessor of four years, subject, though it may have been, to be thereafter divested by the election of the sub-lessee. In *Ganson v. Tiff*, the sub-lease provided that,

at the expiration of the term, or other sooner determination of the demise, the lessee should surrender the demised premises to the lessors, and the Court said: "This constitutes a sub-lease of the premises, and not an assignment of the term." In *Stewart v. Railroad Co.* (1886), 102 N. Y. 601, there was a demise by the lessee to the Long Island Railroad Company for a term longer than that held by the lessee. There was also a different rent to be paid than that provided to be paid by the original lease, and there was a reservation of the right to re-enter for non-payment of rent, etc. It was held that, as to the original landlord, this amounted to an assignment of the lease, and that its character was not destroyed by the reservation therein of a new rent to the assignor with a power of re-entering for non-payment of rent, or by its assumption of the character of a sub-lease. The Court, after laying down the rule substantially as we have heretofore stated it to be recognized by the text-books and recent English decisions, said:

"The effect, therefore, of a demise by a lessee for a period equal to or exceeding his whole term is to divest him of any reversionary right and render his lessee liable, as assignee, to the original lessor, but at the same time the relation of landlord and tenant is created between the parties to the second demise, if they so intended."

Citing Tayl., Landl. & Ten. (7th Ed.) § 109, note; Id. § 16, note 5; 1 Washb., Real Prop. (4th Ed.) 515, note 6; *Adams v. Beach* (1850), 1 Phila. (Pa.) 99; *Carpenters' Union v. Railway Co.* (1873), 45 Ind. 281; *Lee v. Payne* (1856), 4 Mich. 106; *Lloyd v. Cozens* (1830), 2 Ashm. (Pa.) 13; Wood, Landl. & Ten. (Banks' Ed.) 347,—and then adding: "These rules are fully recognized in this State: *Prescott v. De Forest* (1819), 16 Johns. (N. Y.) 159; *Bedford v. Terhune* (1864), 30 N. Y. 457; *Davis v. Morris* (1867), 36 Id. 569; *Woodhull v. Rosenthal* (1875), 61 Id. 382, 391, 392." In speaking of the ruling in *Collins v. Hasbrouck*, *supra*, after stating the facts, the Court said:

"In the opinion, the question is discussed whether the sub-lease amounted to an assignment of the term of the original lease, or a mere sub-letting or re-letting of part of the demised premises. This question, in view of the result reached on the question of waiver, ceased to be controlling; but, in discussing it, the learned judge delivering the opinion made some remarks touching the effect of reserving a new rent in the sub-lease, and of reserving to the original lessee a right of re-entry for a breach of condition by his lessee, which have given rise to some confusion. The features of the instrument, which are above referred to, would be proper sub-

jects of consideration for the purpose of determining whether the relation of landlord and tenant was created as between the original lessee and his lessee, and bore upon the question then before the Court, viz., whether the second lease was a sub-letting or re-letting of part of the demised premises, which constituted a breach of the covenant not to sub-let or re-let. But the question of privity of estate between the original lessor and the lessee of his lessee was not in the case. The determination of the question depends upon whether the whole of the term of the original lessee became vested in his lessee, and the circumstances that the second lease reserves a different rent or a right to entry for breach of condition are immaterial."

And, after quoting many authorities to sustain that position, the opinion proceeds:

"The cases which hold, that where a lessee sub-leases the demised premises for the whole of his term, but his lessee covenants to surrender to him at the end of the term, the sub-lease does not operate as an assignment, proceed upon the theory that, by reason of this covenant to surrender, some fragment of the term remains in the original lessor. In most of the cases, and in the earlier cases in which this doctrine was broached, the language of the covenant was that the sub-lessee would surrender the demised premises on the last day of the term."

It is true that in this case, as has been before stated, the lessee demised for a number of years beyond the term for which he held; but it is impossible that, upon principle, there can be any difference between a demise of an entire term, which can leave no possible space of time remaining in the lessor, and a demise for any additional time beyond the term; for, since no one can demise what he does not have, all that can pass by the demise, in the latter instance, is the entire term of the lessor. If, here, the demise of Frank F. Cole vests his entire interest in the property, as it professes to do, "for and during" the remainder of his term, "and until the 1st day of May, 1888," it cannot be that any portion, however short in duration, of the term granted him by the leases of appellant, remained in him, because they are limited by the same words precisely, namely, "for and during" the term, "and until the 1st day of May, 1888." In *McNeil v. Kendall* (1880), 128 Mass. 245, there were easements reserved from the effect of the lease. In *Dunlap v. Bullard* (1881), 131 Id. 161, however, the facts are analogous in principle to those here involved; and it was held that the demise of the entire term of the lessee was a sub-lease and not an assignment, because of the right reserved in the lease for the lessor to re-enter and resume possession for a breach of the covenants. But this is

held upon the ground that, under the decisions of that Court, the right to re-enter and forfeit the lease is a contingent reversionary estate in the property; the Court having previously held, in *Austin v. Parish* (1838), 21 Pick. (Mass.) 215-223, and *Church v. Grant* (1855), 3 Gray (Mass.) 142-147, that, where an estate is conveyed to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest, which is an estate capable of devise. It has been suggested that these decisions are predicated upon a local statute, (see Tied., Real Prop. note 1, p. 117, and note 1, p. 904, 6 Amer. & Eng. Cyclop. Law.), but whether this be true or not, the decisions are plainly contrary to the principles of the common law. The right to enter for breach of condition subsequent could not be alienated, as it could have been had it been an estate; and Coke says: "The reason hereof is for avoiding of maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entry or re-entry can be granted over:" Co. Litt. § 347 (214*a*). See, also, 1 Com. Dig. tit. "Assignment," C 2, p. 688; 3 Com. Dig. tit. "Condition," O 1, p. 124; 4 Kent, Comm. (8th Ed.) 126, 123; 1 Prest. Est. 20, 21; Shep. Touch. 117, 121. It is said in 1 Washb., Real Prop. (2d Ed.) 474, 451:

"Such a right [*i. e.*, to enter for breach of condition subsequent] is not a reversion, nor is it an estate in land. It is a mere chose in action, and, when enforced, the grantor is in by the forfeiture of the condition, and not by the reverter."

To like effect is, also, Tied., Real Prop. § 277; 6 Amer. & Eng. Cyclop. Law, 903; Tayl., Landl. & Ten. (8th Ed. § 293; *Southard v. Railroad Co.* (1856), 26 N. J. L., 13, 21; *Webster v. Cooper* (1852), 14 How. (55 U. S.) 488, 501; *Schulenberg v. Harriman* (1874), 21 Wall. (88 U. S.), 44, 63; *Nicoll v. Railroad Co.* (1854), 12 N. Y. 121.

It is true that, by section 14 of our statute in relation to landlord and tenant (Rev. St. 1874, p. 659):

"The grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee, or assignee, shall have the same remedies, by entry, action, or otherwise, for the non-performance of any agreement in the lease, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor might have had if such reversion had remained in such lessor or grantor."

But this does not make what was before but a chose in action an estate. The right to enter for breach of covenant is still but a remedy for enforcing performance of a contract which may be defeated by tender: *Tayl., Land. & Ten.* (8th Ed.) 302. As is said by the Court in *De Peyster v. Michael* (1852), 6 N. Y. 467, 507, in speaking of the effect of a like statute of New York: "The statute only authorized the transfer of the right, and did not convert it into a reversionary interest, nor into any other estate." See, also, *Nicoll v. Railroad Co.* (1854), 12 N. Y. 121, at p. 139. It follows that, in our opinion, the rule assumed to be followed in *Collins v. Hasbrouck*, *Ganson v. Tift*, and *Dunlap v. Bullard*, *supra*, is not in conformity with the common law, and that it cannot, therefore, be applied here.

The objection, that the written assent of appellant was not obtained to the assignment, cannot be urged by appellees. The clause in the leases, in that respect, is for the benefit of, and can be set up by appellant alone. He may waive it if he will; and, if he does not choose to set it up, no one else can: *Webster v. Nichols* (1882), 104 Ill. 160; *Willoughby v. Lawrence* (1886), 116 Id. 11; *Arnsby v. Woodward* (1827), 6 B. & C. 519; *Reade v. Farr* (1817), 6 M. & S. 121.

But counsel insist that appellant is estopped, by his conduct, to now allege that the instrument executed by Frank F. Cole is an assignment. We have carefully considered the evidence bearing upon this question, and we are unable to concur in this view. Appellant did refuse to acquiesce in the construction placed by appellees upon the lease of Frank F. Cole, and to settle with them upon that basis. He refused to release Frank F. Cole and accept the Storage Company alone; and he refused to accept the amount of rent which the Storage Company obligated itself to pay Frank F. Cole as a satisfaction of Frank F. Cole's covenant to pay rent to him; but he was all the time willing that the Storage Company should remain in possession, provided the rent due him by his lease to Frank F. Cole was paid to him. He knew the terms of the lease of Frank F. Cole to the Storage Company, and he afterwards received rent from it, and permitted it to remain in possession. The lessee continues, notwithstanding the assignment, liable upon his express covenant to pay rent; and the assignee be-

comes liable upon the same covenant, by reason of his privity of estate, because that covenant runs with the land: *Tayl., Landl. & Ten.* (8th Ed.), § 438; 2 *Platt, Leases*, 356; *Walton v. Cronly* (1835), 14 *Wend. (N. Y.)* 63; *Bailey v. Wells* (1859), 8 *Wis.* 141. Since appellant might sue Cole, on his express covenant to pay rent, and, he having fled the State, take out an attachment in aid thereof, we perceive no reason why he might not at the same time take garnishee process against the Storage Company, and recover any debt which it owed him. There is certainly nothing in this inconsistent with his ultimately enforcing his liability against that company as assignee of Cole's term. It is not shown that the Storage Company has been, by anything done or said by appellant, induced to do to its prejudice anything that it would not otherwise have done. No judgment has been recovered against it, as garnishee of Frank F. Cole, for rent due from it to Frank F. Cole, nor does it appear, otherwise, to have been compelled to pay money or incur liability by reason of any act or word of appellant proceeding upon the recognition of its being liable to Frank F. Cole, as such lessee, only.

For the reasons given, the decree of the Superior Court, and the judgment of the Appellate Court, are reversed, and the cause is remanded to the Superior Court for further proceedings consistent with this opinion.

The distinction between a sub-lease and an assignment, is a fundamental one, based upon principles of the feudal law, and is wholly independent of the form of the conveyance: whether this purports to be a sub-lease, or an assignment, is immaterial: *Thorn v. Woollcombe* (1832), 3 *B. & Ad.* 586, 595; *Bedford v. Terhune* (1864), 30 *N. Y.* 453; *McNeil v. Kendall* (1880), 128 *Mass.* 245, 251.

Under the feudal system, the owner of a fee could not substitute another in his place, without his lord's consent. This restriction on alienation was avoided by the practice of sub-infeudation, by which the tenant granted the land to be held of him as he held it of

his lord, thus making the tenant an intermediate landlord. The Statute of *Quia Emptores*, 18 *Edw. I.*, c. 1, put an end to sub-infeudation, so far as estates in fee were concerned, and, accordingly, wherever that statute is in force, it is possible to become a landlord only by granting an estate less than a fee, and thus retaining a reversion: *Van Rensselaer v. Dennison* (1866), 35 *N. Y.* 393, 400.

Estates for years, being only chattel interests, were not included in the feudal restrictions against alienation, nor did they come within the purview of this statute: 1 *Wash., Real Prop.* (5th Ed.), 462. Hence terms of years could be sold, even before the Statute of *Quia*

Emptores; while in regard to them sub-infeudation can still be practised.

The difference between alienation and sub-infeudation, is the basis of the distinction between an assignment and a sub-letting, in the present law of landlord and tenant.

Although this distinction is of so radical a nature, it is sometimes difficult to determine whether a particular conveyance is a sub lease or an assignment. In such cases, the test to be applied is this: Does the original lessee retain a reversion? In order to retain a reversion, the estate he grants must be smaller than his. Thus, a sub-lease creates a new estate, while an assignment merely transfers an existing estate into new hands: *Comyn, Landl. & Ten.* 51, 52.

The transfers which have been found most difficult to classify, are those in which, as in the principal case, the lessee conveys the land for the entire residue of his term, reserving an additional, or different rent, with a right of re-entry and forfeiture for its non-payment, and exacting a covenant to surrender possession to him, at the expiration of the term, or sooner determination of the lease. There are some decisions to the effect that such an instrument is a sub-lease: *United States v. Hickey* (1873), 17 Wall. (84 U. S.) 13; *Dunlap v. Bullard* (1881), 131 Mass. 161; *Collamer v. Kelley* (1861), 12 Iowa 319, 322; *Collins v. Hasbrouck* (1874), 56 N. Y. 157, 161; but the greater number of authorities, both English and American, hold it to be an assignment: *Wollaston v. Hakewell* (1841), 3 M. & G. 297, 322; *Beardman v. Wilson* (1868), L. R. 4 C. P. 57; *Doe v. Bateman* (1818), 2 B. & Al. 168; *Smith v. Mapleback* (1786), 1 T. R. 441; *Hicks v. Downing* (1796), 1 Ld. Ray. 99; *Bacon's Abr. Leases* I, 3; *Bedford v. Terhune* (1864), 30 N. Y. 453; *Woodhull v. Rosenthal* (1875), 61 Id. 382, 391; *Lloyd v. Cozens*

(1830), 2 Ashm. (Pa.) 131; *Palmer v. Edwards* (1783), 1 Doug. 187; *Smiley v. Van Winkle* (1856), 6 Cal. 605.

In order to make the transaction anything but an assignment, the estate granted must differ from that held by the lessee, either in kind, or in degree. But as it runs for the same length of time as the other, it cannot differ from it in degree. Nor does it differ in kind. True, it is burdened with a new rent, but that does not change its character. If a man buys land, allows another to acquire a right of way over it, and then sells the land, the estate he sells, though subject to an easement, is the same one that he bought, since a right of way confers no interest in the land: *Garrison v. Rudd* (1858), 19 Ill. 558, 564. So, the assignee's estate, though burdened with a new rent (which is an incorporeal hereditament, like a right of way), is the very estate held by the lessee. Thus, too, it has been held that a conveyance of land, to one and his heirs, reserving a perpetual rent, gives the grantee a fee simple,—the same estate as that of his grantor: *De Peyster v. Michael* (1852), 6 N. Y. 467.

Nor does the condition of re-entry and forfeiture change the nature of the estate transferred. Thus, though the sale is a conditional one, it is none the less a sale. If one sells a piano or other chattel, to be paid for in monthly instalments upon the condition, that on failure to pay any instalment, the title shall revert to the seller, this certainly is a sale and not a hiring: *Latham v. Sumner* (1878), 89 Ill. 233; *Lucas v. Campbell* (1878), 88 Id. 447. If land is sold upon condition subsequent, the vendee takes a fee, though his estate is liable to be divested on the happening of the condition: *Nicholl v. N. Y. & E. R. R. Co.* (1854), 12 N. Y. 121, 132. The principle is the same in sales of terms of years.

So, too, a mortgagee of the term, in

possession, is held to be an assignee, though his estate is at most an estate upon condition: *Astor v. Hoyt* (1830), 5 Wend. (N. Y.) 617; *Williams v. Bosanquet* (1819), 1 B. & B. 238.

As to the covenant to surrender the premises to the lessee, it seems to be settled in New York, that the insertion of this clause makes the instrument a sub-lease: *Post v. Kearney* (1849), 2 N. Y. 396; *Collins v. Hasbrouck* (1874), 56 Id. 157, 161; *Ganson v. Tift* (1877), 71 Id. 48, 54; except when the lessee attempts to transfer the land for a term longer than his own: *Stewart v. Long Island R. R. Co.* (1886), 102 Id. 601. These cases proceed upon the theory that the covenant to surrender gives the lessee a reversion of an infinitesimal space of time on the last day of the term. But this theory does not seem to prevail elsewhere.

All the interest the lessee retains in the land, after such a transfer, is a rent charge, with a right of re-entry for non-payment: *Pluck v. Digges* (1831), 5 Bligh, N. S. 42; *Parmenter v. Webber* (1818), 8 Taun. 593. But a rent charge is not an estate: *Langford v. Selmes* (1857), 3 K. & J. 220, 228; *Payn v. Beal* (1847), 4 Denio (N. Y.) 405, 412; *Van Rensselaer v. Dennison* (1866), 35 N. Y. 393, 400; nor, a right of re-entry, a reversion: *De Peyster v. Michael* (1852), 6 Id. 506. If then, the lessee retains no estate himself, he must have done more than carve a smaller estate out of his; and the transaction is clearly an assignment.

As to the rights and duties of assignees and sub-lessees respectively, the decisions are more harmonious. Sub-lessee and assignee are both tenants, the former of the lessee: *Langford v. Selmes* (1857), 3 K. & J. 228; the latter of the reversioner: *Sanders v. Partridge* (1871), 108 Mass. 556. The assignee stands in privity of estate with the reversioner: *Walker's Case* (1587),

3 Rep. 22; *Berland's Appeal* (1870), 66 Pa. 470; *Lester v. Hardesty* (1868), 29 Md. 50; *Donelson v. Polk* (1885), 64 Id. 501; *Salisbury v. Shirley* (1884), 66 Cal. 223. The sub-lessee has with him no privity whatever: *McFarlan v. Watson* (1850), 3 N. Y. 286; *Bailey v. Richardson* (1885), 66 Cal. 416, 421; *Gibson v. Mullican* (1883), 58 Tex. 430, 432.

Each can take emblements, if his estate is unexpectedly determined without his fault: 1 Cruise Dig. 271; even though it be on account of the act, or omission, of the lessee himself: *Oland v. Burdwick* (1596), Cro. Eliz. 460; unless it be determined by the foreclosure of a mortgage made before the lease: *Lynde v. Rowe* (1866), 12 Allen. (Mass.) 100.

The sub-lessee cannot dispute the lessee's title, because the latter is his landlord: *Tilghman v. Little* (1851), 13 Ill. 239; nor the lessor's, because the lessee, under whom he holds, could not: *Lee v. Payne* (1856), 4 Mich. 106, 117; *Doty v. Burdick* (1876), 83 Ill. 473. The assignee cannot dispute the title of the lessor, who is his landlord: *Carter v. Marshall* (1874), 72 Ill. 609; *Green v. Wilson* (1887), Ct. App. Ky.; but may dispute that of the lessee, who is merely his vendor: *Blight's Lessee v. Rochester* (1822), 7 Wheat. (20 U. S.) 534, 548.

An acceptance, by the lessor, of the assignee, as his tenant, while it leaves the lessee still liable on his express covenants: *Ghegan v. Young* (1854), 23 Pa. 18; *Wilson v. Gerhardt* (1886), 9 Colo. 585; *Oswald v. Fratenburgh* (1886), 36 Minn. 270; frees him from his implied covenants, in whole, or in part, according to the extent of the assignment: *Walker's Case* (1587), 3 Rep. 22. But no recognition of the sub-lessee by the original lessor releases the lessee from any of his obligations.

Both assignee and sub-lessee, being

tenants for years, may assign, or sub-let, at pleasure unless restrained by express covenants: 1 Cruise Dig. 277. If the assignee assigns, he loses all connection with the reversioner: *Grundin v. Carter* (1868), 99 Mass. 15; *Dengler v. Michelssen* (1888), S. Ct. Cal., unless he remains in possession: *Negley v. Morgan* (1863), 46 Pa. 281; or unless his assignment is merely colorable; *Beattie v. Parrot S. & C. Co.* (1888), S. Ct. Mont. If the sub-lessee assigns, he remains bound to the lessee by privity of contract. If either of them sub-lets, it does not change his relations to the land, or his landlord: *Carter v. Hammett* (1854), 18 Barb. (N. Y.) 608, 611.

Should the assignee assign to the reversioner, the estate for years merges in the fee, though any rents, reserved on the different assignments, would still remain charged upon the land: *Smiley v. Van Winkle* (1856), 6 Cal. 606. Should the sub-lessee assign to the reversioner, there would be no merger: *Benson v. Bolles* (1831), 8 Wend. (N. Y.) 175, 180.

The lessee cannot, by surrendering to the reversioner, destroy the estate of either assignee or sub-lessee: *Adams v. Goddard* (1859), 48 Me. 212; *Krider v. Ramsey* (1878), 79 N. C. 354; *Baker*

v. Pratt (1854), 15 Ill. 568; *Bailey v. Richardson* (1885), 66 Cal. 421; but if the reversioner enter upon the land, for condition broken, both assignee and sub-lessee lose their estates: *Arnsby v. Woodward* (1827), 6 B. & C. 519.

Rent is annexed to both estates, by law: *Port v. Jackson* (1819), 17 Johns. (N. Y.) 239, 243; and may also be, by contract. On the first ground, each must pay rent to his own landlord, the sub-lessee to the lessee: *Gray v. Rawson* (1850), 11 Ill. 528; *Giddings v. Felker* (1888), 70 Tex. 176; the assignee to the reversioner: *Pingry v. Watkins* (1843), 15 Vt. 479; *Babcock v. Scoville* (1870), 56 Ill. 461; *Salisbury v. Shirley* (1884), 66 Cal. 223. On the second ground, both must of course pay to him with whom they are in privity of contract,—the lessee.

These contrasted qualities of assignments and sub-leases, follow naturally from the distinction between the two, and the basis on which that distinction rests. In order to distinguish between them, and determine the qualities of each, it is only necessary to remember that a sub-lease is a hiring, while an assignment is a sale.

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ABSTRACTS OF RECENT DECISIONS.

ACCIDENT INSURANCE.

Suicide, while insane, is not within the meaning of an accident policy, which excepts death "caused by suicide," nor is it within an exception of death resulting from bodily disease, but is an injury happening "through external, violent and accidental means," for which recovery may be had. *Blackstone v. Standard Life and Accident Ins. Co.*, S. Ct. Mich., April 24, 1889.

ADMIRALTY.

Limitation of year and day, fixed by the Statute of Westminster, within which the owner of a wreck is bound to make his claim, be-

gins to run from the time when the goods are actually taken and seized by the finder. *Murphy v. Dunham*, U. S. D. Ct., E. D. Mich., April 15, 1889.

Sunken cargo is not by the common law a wreck of the sea, which term is confined to goods cast upon the shore, or to jetsam, flotsam or ligam. *Id.*

Tag, which undertakes to tow a raft to a certain place, and which leaves it before arriving at the destination, without ascertaining whether it is made fast or not, and without giving any order in relation to it, is responsible for the loss of the raft, if carried away by the wind and tide. *Stokes v. The Henry Buck*, U. S. D. Ct., D. S. C., April 9, 1889.

ATTORNEY-AT-LAW.

Communications made by a client, while consulting his attorney upon business matters, and the advice and counsel given by the latter, may be received in evidence after the client's death, in a contest over his will, when the object is to lay a foundation for the admission of the attorney's opinion as to the sanity of the testator, and when such communications do not reflect in any manner upon the testator's character or reputation. *In re Layman's Will*, S. Ct. Minn., April 22, 1889.

Statute of limitations begins to run against a claim for money collected by an attorney, who has used no fraud or falsehood to his client in regard to its receipt, from the time the collection is made. *Douglas v. Corry*, S. Ct. Ohio, March 26, 1889.

BANKS AND BANKING.

Certification of check of a depositor by a national bank, who has not on deposit the amount of money specified in such check, while it subjects the bank to the statutory penalties, nevertheless renders it liable upon the certified check. *Thompson v. St. Nicholas Nat. Bank*, Ct. App. N. Y., April 16, 1889.

Fraudulent receipt of deposits by officers of a bank, which they know to be insolvent, gives the depositor no preference over other creditors, unless he can actually trace and recover the identical funds so deposited. *Atkinson v. Rochester Printing Co.*, Ct. App. N. Y., 2d Div., April 23, 1889.

Promise to honor a depositor's checks, when presented by anticipated holders, to the amount of certain collateral pledged to the bank, is not such certification as is forbidden by the Act of Congress. *Thompson v. St. Nicholas Nat. Bank*, Ct. App. N. Y., April 16, 1889.

BILLS AND NOTES.

Acceptance of draft drawn upon the acceptor as executor of a will, under which the drawer is a legatee, and indorsed by him as executor, does not charge the acceptor personally, when he shows

that the understanding of all the parties was that the draft was to be paid only out of the drawer's interest in the estate, and that the acceptance was intended to bind the acceptor only in his official capacity. *Schmittler v. Simon*, Ct. App. N. Y., 2d Div., April 23, 1889.

Accommodation paper may be rescinded at any time before passing into the hands of a third party for value, and if an accommodation indorser notifies a person who is about to purchase the note which he has indorsed, that he withdraws his indorsement and will not be responsible upon the paper, and the latter, notwithstanding such notice, purchases the note, he cannot hold the indorser, upon its non-payment. *Second Nat. Bank of St. Paul v. Howe*, S. Ct. Minn., April 24, 1889.

Negotiability of a promissory note is taken away by a stipulation, making the instalments of interest, and the principal, when due, payable at a certain place, "with exchange on New York," as it cannot be known until the times of payment arrive, what the rates of exchange will be, and the amount necessary to discharge such note is, therefore, uncertain. *Windsor Savings Bank v. McMahon*, U. S. C. Ct., S. D. Iowa, April 6, 1889.

Note given for patent-right, in violation of a statute which makes it a misdemeanor to sell a patent-right without first filing copies of the letters patent, and not containing the words "given for a patent-right," as required by statute, is, nevertheless, good in the hands of one who purchases such note in good faith, without notice, and before maturity. *Tescher v. Merea*, S. Ct. Ind., May 7, 1889.

Notice of protest, under a statute providing that such notice may be given by depositing it in the postoffice, with the postage prepaid and addressed to the indorser, at his regular place of business, is sufficient, where the notice was addressed to the indorser and left by a messenger, in his absence, in a conspicuous place in his office, which was his regular place of business. *Hobbs v. Straine*, S. Jud. Ct. Mass., May 10, 1889.

Parol evidence is not admissible to show that, when a promissory note was delivered to the payee, he agreed to procure the signature of another person, and had failed to do so; nor that the payee had promised, the note having been given by a member of a church society for moneys advanced to pay a church debt, that he would collect subscriptions from other members of the church and apply them to its payment, and had not done so. *Clanin v. Esterly Harvesting Machine Co.*, S. Ct. Ind., April 23, 1889.

Renewal note will not be regarded as a satisfaction of the original note, unless there is an express or implied agreement to that effect. *Williams v. Chisholm*, S. Ct. Ill., April 5, 1889.

BILLS OF LADING.

Limitation of liability, in case of loss of goods shipped, will not control, where there has been negligence on the part of the carrier

and no lower rate of freight has been charged on account of such limitation. *Adams Express Co. v. Harris*, S. Ct. Ind., May 9, 1889.

Stipulation in bill of lading, the provisions of which are not extended to any other carrier than the one receiving the goods shipped, does not inure to the benefit of an intermediate carrier. *Id.*

CHATTEL MORTGAGES.

Constructive notice of a mortgage upon grain in a crib or bin is not given by a recorded mortgage upon the same grain, while growing. *Gillilan v. Kendall*, S. Ct. Neb., May 2, 1889.

Defective description in a mortgage designed to cover crops to be raised on certain land, does not prevent its being binding upon one who has had actual notice of its existence. *Luce v. Moorehead*, S. Ct. Iowa, May 13, 1889.

Description of mortgaged property as "all my crop of corn and cotton for the year 1884, in Faulkner County, Arkansas," is sufficiently definite and certain to render the record of the mortgage constructive notice to third persons. *Johnson v. Grissard*, S. Ct. Ark., May 11, 1889.

CONSTITUTIONAL LAW.

Opinion of Supreme Judicial Court, under a provision of the Constitution of Massachusetts, may be required by the Legislature, or Governor and Council, "upon important questions of law and upon solemn occasions;" the power thus conferred cannot be exercised by the Legislature for the purpose of ascertaining the proper construction of a statute, which the Legislature has full power to alter or amend as it may see fit. *Opinion of the Justices*, S. Jud. Ct. Mass., May 4, 1889.

State statute, making it a criminal offense to solicit or take orders for spirituous liquors in the State, to be delivered at a place without the State, knowing or having reasonable cause to believe that, if so delivered, the same will be transported into the State and sold in violation of the State law, is not unconstitutional, as being a restriction upon inter-state commerce. *Lang v. Lynch*, U. S. C. Ct., D. N. H., April 19, 1889.

CORPORATIONS.

Contract with a *de facto* corporation cannot be repudiated by one who has received the benefit of such contract, upon the ground that the corporation was never legally organized, or that the law under which it was organized is unconstitutional. *Winget v. Quincey Building and Homestead Asso.*, S. Ct. Ill., April 5, 1889.

CRIMINAL LAW.

Former acquittal cannot be pleaded against a prosecution for perjury for swearing falsely upon a preliminary examination before a United States Commissioner that the accused had not sold liquors

without payment of the special tax required by law, when the accused has already been acquitted of the offense charged, but such acquittal may be shown as matter of defense and will effectually estop the prosecution from showing that the oath was false. *U. S. v. Butler*, U. S. D. Ct., E. D. Mich., April 29, 1889.

Jury must determine, under instructions from the court as to the words used in the statute, whether a particular publication, sent through the mails, is of a description prohibited in the postal laws. *U. S. v. Clarke*, U. S. D. Ct., E. D. Mo., April 16, 1889.

Unchastity of prosecutrix may be shown in a prosecution for rape, when the defense is consent, as affecting the question of the probability of such consent. *Carney v. State*, S. Ct. Ind. April 27, 1889.

DAMAGES.

Loss of both legs by a young boy, through the negligence of a railroad company, will not warrant a verdict of \$50,000; such damages would be excessive. *Heddles v. Chicago and N. W. Ry. Co.*, S. Ct. Wis., April 25, 1889.

EVIDENCE.

Judicial notice will be taken, in a prosecution for violation of the Sunday laws, that tobacco and cigars sold by a tobacconist are not drugs and medicines, within the meaning of those words as used in the statute. *Comm. v. Marzynski*, S. Jud. Ct. Mass., May 6, 1889.

FIRE INSURANCE.

Condition against incumbrances will be held to have been waived, when the assured informed the agent of the insuring company of the existence of incumbrances, but the agent wrote the application, stating that there were no incumbrances, and the assured signed it at his request; the agent having also stated in the application that he had inspected the property, was satisfied that the answers were correct, and recommended the risk as free from all moral or financial hazard. *Reiner v. Dwelling-House Ins. Co.*, S. Ct. Wis., April 25, 1889.

Violation of condition in policy, prohibiting alteration in use of insured premises, so as to increase the risk, does not merely suspend the policy, but renders it absolutely void, although such use ceased before the occurrence of the loss. *Kyte v. Commercial Union Assr. Co.*, S. Jud. Ct. Mass., May 9, 1889.

Waiver of proofs of loss is not constituted by a letter written the assured by the secretary of the insuring company, after the loss and before the expiration of the time for furnishing proofs, in which he states that, after investigation, he considers the claim invalid, but that the assured may re-open the matter and make proofs of loss, specifying the facts which the assured must establish by such proofs. *Walsh v. Des Moines Ins. Co.*, S. Ct. Iowa, May 14, 1889.

HOMESTEAD LAWS.

Mortgage upon land entered under the United States homestead laws may be made by the person making the entry, before submitting final proof or receiving the final certificate. *Lang v. Morey*, S. Ct. Minn., April 24, 1889.

LIBEL.

List of discharged employes of a railroad company, giving the reasons for their discharge, and placed in the hands of persons whose duty it is to employ servants on behalf of the company, is a privileged communication. *Missouri Pacific Ry. Co. v. Richmond*, S. Ct. Tex., April 26, 1889.

LIQUOR LAWS.

Taxation, imposed by State statute upon persons manufacturing or selling, either at wholesale or retail, spirituous liquors within the State, subject, however, to the provision that no person paying a manufacturer's tax shall also pay a wholesale dealer's tax, makes no discrimination between the citizens of the taxing State and those of other States, or between local and foreign products, and an agent of a foreign manufacturer, who sells at wholesale, within the State, imported liquors in the original packages, without paying the prescribed tax, is subject to the penalties provided by the statute. *People v. Lyng*, S. Ct. Mich., April 19, 1889.

MARINE INSURANCE.

Cargo of sunken vessel, abandoned to the underwriters, may be sold by such underwriters to a third person. *Murphy v. Dunham*, U. S. D. Ct., E. D. Mich., April 15, 1889.

Unseaworthiness was exempted from the risks insured against by a marine policy upon a canal-boat, which was old and subjected to heavy strains, and which suddenly sprang a leak and sank in fair weather and smooth water; the boat was presumptively unseaworthy, and it was incumbent upon the assured to rebut this presumption, or to show that the loss was occasioned by some other cause, in order to recover upon the policy. *Berwind v. Greenwich Ins. Co.*, Ct. App. N. Y., 2d Div., April 23, 1889.

NEGLIGENCE.

Absence of railing and trap-door to an elevator opening, in violation of a State statute which provides for such railings and trap-doors "as may be directed and approved by the superintendent of buildings," whereby an injury results, is *prima facie* evidence of negligence on the part of the owner, although the elevator may have been in the same condition for several years, without objection or direction by the building superintendent. *McRickard v. Flint*, Ct. App. N. Y., 2d Div., April 23, 1889.

NUISANCE.

Land may be cultivated by the owner in the usual and reasonable manner, without liability to a lower proprietor, whose mill-pond is injured by the soil being drained into it by reason of such cultivation. *Middlesex Co. v. McCue*, S. Jud. Ct. Mass., May 6, 1889.

PUBLIC OFFICERS.

Power to remove a public officer does not include the power to suspend. *Gregory v. Mayor, etc., of N. Y.*, Ct. App. N. Y., April 16, 1889.

RAILROADS.

Improper loading of a freight car upon a railroad, which has provided a proper car and competent servants for the inspection of loaded cars, by reason of which an employe is injured, does not render the railroad company liable, such injury being the result of the negligence of the servants whose duty it is to inspect cars, and who are fellow-servants of the injured person. *Byrnes v. New York, L. E. & W. R. R. Co.*, Ct. App. N. Y., April 16, 1889.

No recovery can be had by one who was struck and injured by a passenger train, while attempting to drive a four-horse team across a railway track, when he was familiar with the crossing and knew that the regular west-bound train was due, but, being stopped by an east-bound freight train, delayed until the latter had passed, and then, without waiting a moment, drove his team in front of the train approaching on the other track, which he might easily have seen. *Fletcher v. Fitchburg R. R. Co.*, S. Jud. Ct. Mass., May 9, 1889.

REMOVAL OF CAUSES.

Local prejudice is sufficient ground for removal of a cause to the Federal Court, without regard to the amount in controversy. *McDermott v. Chicago & N. W. Ry. Co.*, U. S. C. Ct., N. D. Iowa, May 3, 1889.

Resident defendant, who has been sued in a State Court by a citizen of another State, may remove the cause to the Federal Court under the Act of Congress of August 13, 1888. *Stanbrough v. Cook*, U. S. C. Ct., N. D. Iowa, April 20, 1889.

TAXATION.

Exemption from taxation of "every building for public worship," with the lot on which it is situated and the furniture belonging to it, rendered by another statute inapplicable to any such building, unless used exclusively for such purpose and exclusively the property of a religious society, does not cover the building owned and occupied exclusively by a Young Men's Christian Association, formed for the improvement of the spiritual, mental and social condition of young men, by means of sermons, libraries, reading rooms, social meetings and other means, such as lectures, gymnasium, concerts

and entertainments, one room only, out of twenty-two in such building, being used for public worship, and that not exclusively. *Young Men's Christian Asso. v. Mayor, etc., of N. Y.*, Ct. App. N. Y., April 16, 1889.

VERDICT.

Affidavits of jurors will not be received upon a motion for a new trial, for the purpose of impeaching their verdict as rendered. *McKinley v. First Nat. Bank of Crawfordsville*, S. Ct. Ind., April 23, 1889.

WILLS.

Bequest of bond, having an overdue interest coupon attached at the time of testator's death, carries such coupon also. *Ogden v. Pattee*, S. Jud. Ct. Mass., May 6, 1889.

Condition annexed to a devise in remainder, that the devisee, who was an infant when the will was made, should live with the testator's sister and be under her sole care and guardianship, until he should reach the age of twenty-one years, but in case he should not comply with such condition, the premises should vest in other persons, is valid. *Johnson v. Warren*, S. Ct. Mich., April 19, 1889.

Conversion of realty is not worked by a will, by which the testator, after certain legacies, gives to his executors all the residue of his estate in trust, with power to receive the rents and profits, to sell and convey the property, to invest both the rents and profits and the proceeds of sales, and to "divide and apply the same and the income thereof" as directed. *Scholle v. Scholle*, Ct. App. N. Y., April 16, 1889.

Lapse of devise to one, "to have and to hold the same to him, his heirs and assigns, forever," occurs upon the death of the devisee in the testator's life time. *In re Wells*, Ct. App. N. Y., April 16, 1889.

Real estate, owned by the testator, does not pass under a will which directs: "I do order that all my property, consisting of bonds, mortgages, ground-rents, stocks and personal effects, in the State of Pennsylvania, be sold," and the proceeds divided among certain beneficiaries named, but such real estate vests in the testator's heirs, in accordance with the inter-state laws. *Howe's Appeal*, S. Ct. Pa., May 6, 1889.

JAMES C. SELLERS.

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STATUTORY LIABILITY FOR CAUSING DEATH.

(Completed.)

It has been held in Wisconsin, *Woodward v. Chicago & N. W. Ry. Co.* (1868), 23 Wis. 400, that an action, brought under the statute giving damages for the benefit of relatives, abates on the death of the beneficiary; and in Missouri, *Gibbs v. City of Hannibal* (1884), 82 Mo. 143, that the right of action will not survive to the administrator of a beneficiary; on the theory that the action, given by the act, is itself a continuance or survival of the right of action vested in the decedent. In Connecticut, however, a statute (distinct from the one heretofore quoted), making a railroad company liable when the life of a passenger is lost by negligence, it was held that the right of action would survive the death of the beneficiary named in the act: *Waldo v. Goodsell* (1866), 33 Conn. 432; and, in an early case in the New York Supreme Court, *Yertore v. Wiswall* (1858), 16 How. Pr. 8, which is followed in a recent case in the same Court, *Hegerich v. Keddle* (1884), 32 Hun. 141, DANIELS, J., dissenting, it is held that the right of action survives *against* the personal representatives of the wrong doer; the action authorized being, in the view of the Court, "a new action, not another action continued," and the subject of the action being regarded as "property, the value of a life."

In the Illinois case of *Holton v. Daly* (1883), 106 Ill. 131, it will be remembered that the Court wished an administrator continuing an action begun by his intestate for personal inju-

ries, to be regarded as continuing it under the act giving damages for death; it is therefore interesting to note that in the opinion in *Yertore v. Wiswall*, it is said that it would not be proper, if an action is begun during the life of a person injured, to ask for a continuance of it after his death under the statute: per HOGEBROOM, J., *Id.* 16 How. Pr. (N. Y.) 13.

To the same effect, it would seem, is the Indiana case of *Indianapolis & St. Louis R. R. Co. v. Stout* (1876), 53 Ind. 143. There a statute provided that—

“ A cause of action, arising out of an injury to the person, dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, and actions for seduction and false imprisonment.”

An action having been brought by an injured person during his lifetime, pending which he died from the injuries, it was held that such action was abated by the death, and that it was consequently no bar to an action brought by the administrator under the statute giving damages for the benefit of the deceased's family.

In several instances, questions have arisen as to the application of the statutes of limitations to these actions, and have involved a discussion as to the nature of the right of action conferred. In Connecticut, under the Act of that State last referred to, *Andrews v. Hartford & N. H. R. R. Co.* (1867), 34 Conn. 57, it is held that the right of action accrues only upon death, and that therefore the statute of limitations will not begin to run until the appointment of an administrator.

In Iowa, *Sherman v. Western Stage Co.* (1868), 24 Iowa 516, in case of a death by drowning, it was held that the death should be considered as instantaneous, although the deceased struggled in the water for ten minutes before he drowned; and that, as the statute of limitations therefore did not begin to run in the lifetime of deceased, it was suspended until the appointment of an administrator. COLE, J., dissented in this case, holding that the cause of action rests upon the occurrence of the injury, and did so in the case at bar, upon the deceased's falling into the water, that the statutes do not create a new cause of action, but simply remove the common law bar to a recovery, when the wrongful act produces death; he quotes approvingly the language of COMSTOCK, J., in *Dibble v. N. Y. &*

E. R. R. Co. (1857), 25 Barb. (N. Y.) 183, and distinguishes the English statute from our American statutes, on the ground that, under the former, the parties receive damages severally proportioned to their losses. Subsequently to the last named decision, a provision seems to have been incorporated in the Iowa Code, to the effect that—

“Such action shall be deemed a continuing one, and to have accrued to such representative, or successor, at the same time as it did to the deceased, if he had survived.”

Under this enactment, it is held that the statute of limitations runs from the time of the original injury: *Ewell v. Chicago & N. W. Ry. Co.* (1886), U. S. C. Ct., S. Dist. Iowa, 29 Fed. Repr. 57. It had previously been held in Iowa, *Sherman v. Western Stage Co.* (1867), 22 Iowa 556, that the action was one for injury to the person, and therefore subject to the two years statute of limitations, applicable to such actions.

In Tennessee, a case, *Fowlkes v. Nashville & Decatur R. R. Co.* (1872), 9 Heisk. (Tenn.) 829, involving the application of the statute of limitations, came before the Court, and was held under advisement until 1876, the Court being equally divided upon the case until the death of the Chief Justice occurred and left an odd number of judges. It will be remembered that the statute of Tennessee provides that the right of action, which the person killed would have had, shall not abate, or be extinguished, by his death, but shall pass to his personal representative for the benefit of his widow and next of kin. The statute is, in fact, a hybrid in form, being the result of an attempt to combine the two ordinary forms of enactment; that is, one making the right of action belonging to the injured person to survive his death, and the other creating a right of action in favor of third persons for the injury to them by the death. In dealing with the question of damages under it, and the question of its application to cases of instantaneous death, the earlier decisions treated the statute as merely a survival act, limiting the damages to such as the injured person himself could have recovered in his lifetime, and denying the application of the act altogether in cases of instant death; but a subsequent decision gave it a wider scope, acknowledged its applicability to cases of instant death, and permitted damages

to be assessed, both on account of decedent's sufferings, etc., in his lifetime, and the loss suffered by his relatives in consequence of his death. With this double theory of the purpose and operation of the statute, it naturally became a very difficult and embarrassing matter to say when the statute of limitations, in an action under it, would begin to run. In fact, the members of the Court were not able to agree after retaining the case for four years. The majority held that the statute of limitations began to run at the moment of the injury, and therefore was not suspended during the period between the death and the qualification of the administrator, as it would be if the cause of action did not accrue until after the death. The death, in the case before the Court, did not occur until a few days after the injury, and it, perhaps, was not necessary to decide anything with regard to the case of instant death, but the majority opinion nevertheless covers that question, holding that the statute, in such case, begins to run immediately, and is not suspended, upon the theory that, in every case, a moment elapses between the infliction of the injury and the death, there being strictly no such thing as instant death. The statute, the prevailing opinion says, merely repeals the rule of the common law, that actions for personal injuries die with the person, in cases where the person dies of the injury. A dissenting minority of two (there, being five members of the Court), held that the statute did not begin to run until the death, and consequently not until the appointment of an administrator; the position being taken distinctly and emphatically, especially in the opinion of TURNER, J., that the statute created a new cause of action which only accrued upon the death of the person injured.

With this review of the authorities, including all of importance which have come to our notice, bearing upon the question of construction which we proposed at the outset, let us return to a consideration of that question upon its merits. We have no hesitation in declaring a preference for the view which regards the right of action given by Lord Campbell's Act and those of our American statutes which do not differ widely from it in form, as a new right of action, and not a revival or continuation of a common law right possessed by the deceased.

When we consider (1) that the purpose of the action is to compensate certain persons for the indirect injury to them, involved in causing the death of another; (2) that the right of action thus given, is not conditional upon a right of action having vested in the deceased, but arises, as well in cases of instantaneous death, as others, the remedy being in fact particularly called for in cases of sudden death; and (3) that the damages given in the action, entirely exclude such as the deceased himself could have recovered, we find it impossible to reach any other conclusion.

It is frequently said that the scope of the original right of action, which the deceased would have had, is merely enlarged so as to embrace the injury resulting from the death (See Cooley on Torts * 264), but this attempted explanation of the different rule of damages applied in the action under the statute, will not serve its purpose, since not only are new damages included in the new action, but the old damages are entirely excluded; the remedy is not enlarged to embrace the death, but is, under the statute, confined to the death. It is sometimes said that it is impossible to draw a line, severing with accuracy the damages to the person injured, from those to his relatives. See, for example, *Holton v. Daly* (1883), 106 Ill. 131, page 140, of opinion; but it is a sufficient answer to this objection, that both the language of the statute, and all the decisions, construing it, require such a line to be drawn.

Then again it is said that, although the measure of damages is different from what it would be in an action by the injured person in his lifetime, the cause of action is in both cases the same, that is, the wrongful act, neglect or default. The simple answer to this statement is, that the two actions are brought for different consequences of the same act, and are certainly as distinct from each other as is the action brought by a husband, or father, for an injury to his wife, or child, from the personal action of the wife, or child, for the same injury.

The view that the right of action given by the statute is merely a continuance of the common law right of action was first broached, as we have seen, when the question of permitting two recoveries arose. In our view, the courts, in their anxiety to prevent what was deemed a most undesirable result,

overshot the mark and advanced a theory of the statute which they could not successfully defend, and which was perhaps not necessary to accomplish the desired end. We are disposed to agree with the recent New York case of *Littlewood v. Mayor of New York* (1882), 89 N. Y. 24, in thinking that enough is to be found in the language of the statute, to disclose an intention not to allow a suit to be maintained under the statute, when the injured person has recovered compensation in his lifetime, but not upon the theory that the statute provides for a continuation, in the representatives, of the cause of action which the deceased had. The original act, the wording of which is closely followed by the New York and other acts, although making the damages recoverable such as result to the relatives named, *from* the death, provides that—

“The person who would have been liable if death had not ensued, shall be liable to an action for damages, *notwithstanding* the death,” etc.

This seems very much like a contradiction in terms, as if the statute spoke of one being liable *for* a death, and at the same time, *notwithstanding* the death. The use of the latter expression, taken by itself, favors the theory which we are opposing, but, for the reasons before given, we must regard it as controlled and outweighed for general purposes by the general scope, and the language of other parts of the act. As the whole clause quoted, however, indicates an intention on the part of the legislature to impose liability only upon one who would otherwise have escaped liability by the death of the injured person, effect may be given to it so far, and it may be construed to exclude liability under the statute, when the deceased has himself recovered damages in his lifetime. The phraseology of the statute shows confusion of thought, and this it is which is responsible for the controversies which have arisen.

The Pennsylvania statute, before referred to, commends itself to us as a model of clearness and brevity. It provides that—

“Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of such deceased, or, if there be no widow, the personal representative, may maintain an action for and recover damages for the death thus occasioned:” Act 15 April, 1851, § 18, P. L. 674.

This language is plain and consistent. Damages are to be recovered "*for* the death," not "*notwithstanding* the death," and yet only on condition that no suit was brought by the party injured during his or her life. Such stubborn controversies could hardly arise under this act, as we have found arising under the English act and most of its American descendants. In one Pennsylvania case, it was claimed that the act was "not intended to create any new cause of action unknown to the common law, but only to prevent the abatement of personal actions according to the common law maxim, *actio personalis moritur cum persona*;" but the claim was overruled by the Court: *Fink v. Garman* (1861), 40 Pa. 95. This American statute says directly what the English statute says inferentially, and, in both cases, the right of action given is not a *continuation* of that which the deceased had, but an independent remedy which, where no law provides expressly for the survival of the former, is, in effect, a *substitute* therefor.

As to the right to maintain two actions after the death of the injured person (supposing him not to have recovered damages in his lifetime), where there is, in addition to the special act, a general provision of law making rights of action, for injury to the person, survive, it seems that such right should be ordinarily recognized, in the absence of an express provision to the contrary. The opposite and inconsistent courses adopted by different courts, in the attempt to escape from this result, seem to convict them all of being without warrant. If this is the correct view, it will sometimes happen that two actions will be maintainable after death, one representing the injured person's cause of action, the other the family's cause of action, when, at the same time, a recovery upon the former, before death, would have precluded any further recovery whatever; and it may be urged as an objection to the view, therefore, that it involves an inconsistency. There is seeming force in this objection, but the charge of inconsistency should be laid at the door of the legislature which enacts the statutes. From the fact that the special statute only provides for an action after death, when none has been brought in the lifetime, it can not properly be inferred that there is to be only a single action after death, when there has been none during the lifetime; because, if for

no other reason, there is nothing to indicate under which statute such action shall be brought, which right of action, which liability is to have the preference. It should be said that the phraseology of the first section of the English act can not be used with any propriety where the general law provides for the survival of causes of action for injury to the person, as it assumes that such causes of action do not survive; and, if so used, the circumstance of its origin should be taken into account, in the attempt to construe the statute, in competition with the survival act. The language in such case must be recognized as merely containing an erroneous assumption, with reference to the law of the State where it is adopted, and should not be deemed to have been used with the intent either of cutting down the survival act, or of restricting the natural meaning and operation of the statute itself.

CHARLES R. DARLING.

LORD CAMPBELL'S ACT.

CHAPTER XCIII.

(Stat. 9 and 10 Victoria—26th August, 1846; as amended by Stat. 38 and 39 Victoria, ch. 66—11th August, 1875).

WHEREAS, No action at law is now maintainable against a person, who, by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer, in such case, should be answerable in damages for the injury so caused by him;

I. *Be it therefore enacted*, by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued), have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to felony.

II. *And be it enacted*, that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by, and in the name of, the executor, or administrator, of the person deceased; and in every such action, the jury may give such damages as they may think proportioned to the injury, resulting from such death, to the parties respectively for whom, and for whose benefit, such action shall be brought, and

the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the beforementioned parties, in such shares as the jury, by the verdict, shall find and direct.

III. *Provided always*, and be it enacted, that not more than one action shall be for, and in respect of, the same subject matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

IV. *And be it enacted*, that in every such action, the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant, or his attorney, a full particular of the person, or persons, for whom, and on whose behalf, such action shall be brought, and of the nature of the claim, in respect of which damages shall be sought to be recovered.

V. *And be it enacted*, that the following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context, or by the nature of the subject matter; that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons, or things, and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

VI. *And be it enacted*, that this Act shall come into operation, from and immediately after the passing thereof, and that [repealed, Stat. Law Rev. Act, 1875] * * * * nothing herein contained shall apply to that part of the United Kingdom, called Scotland.

VII. [Repealed, Stat. Law Rev. Act, 1875].

U. S. Circuit Court, N. Dist. California.

MATTER OF DAVID NEAGLE.

Upon a writ of *habeas corpus*, the United States Courts have jurisdiction to discharge the petitioner, when found to be in custody for an act done, or omitted, in pursuance of a law of the United States, no matter from whom, or under what authority, the process may have issued under which he is held.

The circumstances of a homicide, committed by an officer of the United States, will be inquired into by the United States Courts, to determine whether the act was committed in the line of his duty, or was malicious, wanton, or reckless, and without any reasonable apparent necessity. The Court does not make the inquiry at all, to decide whether a State statute has been violated, or whether the homicide has been committed upon land within the exclusive jurisdiction of the United States.

In matters of the public peace, in which the Government of the United States is concerned, the Marshals and Deputy Marshals, within the scope of their authority, are National peace officers, with all the statutory and common law powers appertaining to peace officers.

An assault upon, or an assassination of a Judge of an United States Court, whilst traveling for the purpose of holding Court, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the Marshal, or his deputies, to prevent, as peace officers of the Government of the United States.

This was an application for the discharge of David Neagle, a Deputy United States Marshal.

The facts of the case may be divided into two stages; the first as follows—

On the third of September, 1888, certain cases were pending in this Court, between *Frederick W. Sharon*, as executor, against *David S. Terry* and *Sarah Althea Terry*, his wife, and between *Francis G. Newlands*, as trustee, and others, against the same parties, on demurrers to bills to revive, and carry into execution, the final decree of the Court, in the suit of *William Sharon* against *Sarah Althea Hill*, and were decided on that day. That suit was brought to have an alleged marriage contract between the parties adjudged to be a forgery, and obtain its surrender and cancelation. The decree rendered adjudged the alleged marriage contract to be a forgery, and ordered it to be surrendered and canceled. The decree was rendered after the death of William Sharon, and was therefore entered as of the day when the case was submitted to the Court. By reason of the death of Sharon, it was necessary, in order to execute the decree, that the suit should be revived. Two bills were filed, one by the executor of the estate of Sharon, and the other, a bill of revivor and supplemental by Newlands, as trustee, for that purpose.

In deciding the cases, the Court gave an elaborate opinion upon the questions involved, and whilst it was being read, certain disorderly proceedings took place, for which the defendants, David S. Terry and his wife, were adjudged guilty of contempt and ordered to be imprisoned. See *In re Terry*, 36 Fed. Repr. 419.

The second stage of the case began upon the release of Terry and his wife, who made various threats of personal violence to Justice FIELD and the Circuit Judge. These threats were that they would take the lives of both Judges; those against Justice FIELD were sometimes, that they would take his life directly; at other times, that they would subject him to great personal indignities and humiliations, and if he resented it, they would kill him.

These threats were not made in ambiguous terms, but openly and repeatedly, not to one person, but to many persons, until they became the subject of conversation throughout the State and of notice in the public journals. Reports of these threats, through the press, and through reports of the United States Marshal and United States Attorney, reached Washington, and in consequence of them, the Attorney-General thought proper to give instructions to the Marshal of the United States for the Northern District of California, to take proper measures to protect the persons of the Judges from violence at the hands of Terry and his wife. On the return

of Justice FIELD from Washington, to attend his circuit, in June last, the probability of an attack by Terry upon him, was the subject of conversation throughout the State, and of notices in some of the journals in the City of San Francisco. It was the general expectation that if Terry met Justice FIELD, violence would be attempted upon the latter.

In consequence of this general belief and expectation, and the fact that the Attorney-General of the United States had given instructions to the Marshal to see that the persons of Justice FIELD and of the Circuit Judge, should be protected from violence, the Marshal of the Northern District appointed the petitioner in this case, David Neagle, to accompany Mr. Justice FIELD whilst engaged in the performance of his duties and whilst passing from one district to another within his circuit, so as to guard him against the threatened attacks. He was specially commissioned as a deputy by Mr. Franks, whose instructions to him were that he should protect Justice FIELD at all hazards, and knowing the violent and desperate character of Terry, that he should be active and alert, and be fully prepared for any emergency, but not to be rash; and in case any violence was attempted from any one, to call upon the assailant to stop, and to inform him that he was an officer of the United States.

Terry was a man of great size and strength, who had the reputation of being always armed with a bowie-knife, in the use of which he was specially skilled, and of showing great readiness to draw and use it upon persons towards whom he entertained any enmity or had any grievance, real or fancied.

On the 8th of August, 1889, Justice FIELD left San Francisco for Los Angeles, in order to hear a *habeas corpus* case which was returnable before him at that city on the 10th of August, and also to be present at the opening of the Court on the 12th. He was accompanied by Deputy Marshal Neagle, the petitioner. Justice FIELD heard the *habeas corpus* case on the 10th of August. On the 12th of August he opened the Circuit Court, Judge Ross sitting with him, and he delivered on the latter day an opinion in an important land case, and also an opinion in the *habeas corpus* case. On the following day the Court heard an application for an injunction in an important water case from San Diego County. No other cases being ready for hearing before the Circuit Court, he took the train on Tuesday, the 13th, at 1:30 o'clock in the afternoon, for San Francisco, where he was expected to hear a case then awaiting his arrival, immediately upon his return, being accompanied on his return by Deputy Marshal Neagle. On the morning of the 14th, between the hours of seven and eight, the train arrived at Lathrop, in San Joaquin County, which is in the Northern District of California, a station at which the train stopped for breakfast. Justice FIELD and the Deputy Marshal at once

entered the dining-room, there to take their breakfast, and took their seats at the third table in the middle row of tables. Justice FIELD seated himself at the extreme end, on the side looking toward the door. The Deputy Marshal took the next seat on the left of the Justice. What subsequently occurred is thus stated in the testimony of Justice FIELD—

“A few minutes afterward, Judge Terry and his wife came in. When Mrs. Terry saw me, which she did directly she got diagonally opposite me, she wheeled around suddenly and went out in great haste. I afterwards understood, as you heard here, that she went for her satchel. Judge Terry walked past, opposite to me, and took his seat at the second table below. The only remark I made to Mr. Neagle was, ‘There is Judge Terry and his wife.’ He remarked, ‘I see him.’ Not another word was said. I commenced eating my breakfast. I saw Judge Terry take his seat. In a moment or two afterwards I looked round and saw Judge Terry rise from his seat. I supposed at the time he was going out to meet his wife, as she had not returned, so I went on with my breakfast. It seems, however, that he came round back of me—I did not see him—and he struck me a violent blow in the face, followed instantaneously by another blow. Coming so immediately together, the two blows seemed like one assault. I heard ‘Stop! stop!’ cried by Neagle. Of course I was for a moment dazed by the blows. I turned my head round and I saw that great form of Terry’s, with his arm raised and his fists clenched to strike me. I felt that a terrific blow was coming, and his arm was descending in a curved way, as though to strike the side of my temple, when I heard Neagle cry out, ‘Stop! stop! I am an officer.’ Instantly two shots followed. I can only explain the second shot from the fact that he did not fall instantly. I did not get up from my seat, although it is proper for me to say that a friend of mine thinks that I did; but I did not. I looked around and saw Terry on the floor. I looked at him and saw that peculiar movement of the eyes that indicates the presence of death. Of course it was a great shock to me. It is impossible for any one to see a man in the full vigor of life, with all those faculties that constitute life, instantly extinguished, without being affected, and I was. I looked at him for a moment, then rose from my seat, went around and looked at him again, and passed on. Great excitement followed. A gentleman came to me whom I did not know, but I think it was Mr. Lidgerwood, who has been examined as a witness in this case, and said: ‘What is this?’ I said: ‘I am a Justice of the Supreme Court of the United States. My name is Judge FIELD. Judge Terry threatened my life, and attacked me, and the Deputy Marshal has shot him.’ The Deputy Marshal was perfectly cool and collected, and stated: ‘I am a Deputy Marshal and I have shot him to protect the life of Judge FIELD.’ I cannot give you the exact words, but I give them to you as near as I can remember them. A few moments afterwards the Deputy Marshal said to me: ‘Judge, I think you had better go to the car.’ I said, ‘Very well.’ Then this gentleman, Mr. Lidgerwood, said: ‘I think you had better.’ And with the two I went to the car. I asked Mr. Lidgerwood to go back and get my hat and cane, which he did. The Marshal went with me, remained for some time and then left his seat in the car, and, as I thought, went back to the dining-room. (This is, however, I am told, a mistake, and that he only went to the end of the car.) He returned, and either

he or some one else stated that there was great excitement, that Mrs. Terry was calling for some violent proceedings. I must say here that, dreadful as it is to take life, it was only a question of seconds whether my life or Judge Terry's life should be taken. I am firmly convinced that had the Marshal delayed two seconds both he and myself would have been the victims of Terry."

In answer to a question whether he had a pistol or other weapon on the occasion of the homicide, Justice FIELD replied—

"No, sir. I have never had on my person, or used a weapon, since I went on the bench of the Supreme Court of the State, on October 13, 1857, except once." (That was on an occasion when he crossed the Sierra Nevada Mountains, in 1862.) "With that exception, I have not had on my person, or used a pistol or other deadly weapon."

Mr. Neagle in his testimony stated that, before the train arrived at Fresno, he got up and went out on the platform, leaving the train, and there saw Terry and his wife get on the cars; that when the train arrived at Merced, he spoke to the conductor, Woodward, and informed him that he was a Deputy United States Marshal; that Judge FIELD was on the train, and also Terry and his wife, and that he was apprehensive that when the train arrived at Lathrop, there would be trouble between those parties, and inquired whether there was any officer at that station, and was informed in reply that there was a constable there; that he then requested the conductor to send word to the officer to be at Lathrop on the arrival of the train, and that he also applied to other parties to induce them to endeavor to secure assistance for him at that place in case it should be needed.

The Deputy Marshal further stated that when the train arrived at Lathrop Justice FIELD went into the dining-room, he accompanying the Justice; that they took seats at a table; that shortly after they were seated, Terry and his wife entered the dining-room, his wife following him several feet in the rear; that when the wife reached a point nearly opposite Justice FIELD, she turned around and went out rapidly from the room, and, as appeared from what afterward followed, she went to the car to get her satchel. When she returned from the car the satchel was taken from her, and it was found to contain a pistol—revolver—containing six chambers, all of which were loaded with ball. This pistol lay on the top of the other articles in the satchel. The witness further stated that Terry passed down opposite Justice FIELD, to a table below where they were sitting; that in a few minutes, whilst Justice FIELD was eating, Terry rose from his seat, went around behind him—the Justice not seeing him at the time—and struck him two blows, one on the side and the other on the back of the head; that the second blow followed the other imme-

diately; that one was given with the right hand and the other with the left; that Terry then drew back his hand, with his fist clenched, apparently to give the Justice a violent blow on the side of his head, when he, Neagle, sprang to his feet, calling out to Terry, "Stop! Stop! I am an officer;" that Terry bore at the time on his face an expression of intense hate and passion, the most malignant the witness had ever seen in his life, and that he had seen a great many men in his time in such situations, and that the expression meant life or death for one or the other; that as he cried out those words, "Stop! Stop! I am an officer," he jumped between Terry and Justice FIELD, and, at that moment, Terry appeared to recognize him, and instantly, with a growl, moved his right hand to his left breast, to the position where he usually carried his bowie-knife; that, as his hand got there, the Deputy Marshal raised his pistol and shot twice in rapid succession, killing him almost instantly. He further stated that the position of Judge FIELD was such—his legs being at the time under the table, and he sitting—that it would have been impossible for him to have done anything even if he had been armed, and that Terry had a very furious expression, which was characterized by the witness as that of an infuriated giant. He also added, that his cry to him to stop was so loud that it could be heard throughout the whole room, and that he believed that a delay in shooting of two seconds would have been fatal both to himself and Justice FIELD.

The facts thus stated in the testimony of Justice FIELD and the petitioner, were corroborated by the testimony of all the witnesses to the transaction. The petitioner soon afterwards accompanied Justice FIELD to the car, and whilst in the car, he was arrested by a constable, and at the station below Lathrop was taken by that officer from the car to Stockton, the county seat of San Joaquin County, where he was lodged in the county jail. Mr. Justice FIELD was obliged to continue on to San Francisco without the protection of any officer. On the evening of that day, Mrs. Terry, who did not see the transaction, but was at the time outside of the dining-room, made an affidavit that the killing of Terry was murder, and charged Justice FIELD and Deputy Marshal Neagle with the commission of the crime. Upon this affidavit, a warrant was issued by a Justice of the Peace at Stockton against Neagle and also against Justice FIELD. Subsequently, after the arrest of Justice FIELD, and after his being released by the United States Circuit Court on *habeas corpus* upon his own recognizance, the proceeding against him before the Justice of the Peace was dismissed, the Governor of the State having written a letter to the Attorney-General of the State, declaring that the proceeding, if persisted in, would be a burning disgrace to the State, and the Attorney-General having advised the District Attorney of

San Joaquin County to dismiss it. There was no other testimony whatever before the Justice of the Peace, except the affidavit of Sarah Althea Terry, upon which the warrant was issued.

The petition was accordingly presented, on behalf of Neagle, to the Circuit Court of the United States for a writ of *habeas corpus* in this case, alleging, among other things, that he was arrested and confined in prison for an act done by him in the performance of his duty, namely, the protection of Mr. Justice FIELD, and taken away from the further protection, which he was ordered to give to him. The writ was issued, and upon its return the Sheriff of San Joaquin County produced a copy of the warrant issued by the Justice of the Peace of that county, and of the affidavit of Sarah Althea Terry, upon which it was issued.

A traverse to that return was then filed in this case, presenting various grounds why the petitioner should not be held, the most important of which were—

That an officer of the United States, specially charged with a particular duty, that of protecting one of the Justices of the Supreme Court of the United States, whilst engaged in the performance of his duty, could not, for an act constituting the very performance of that duty, be taken from the further discharge of his duty and imprisoned by the State authorities, and—

That, when an officer of the United States, in the discharge of his duties, is charged with an offense consisting in the performance of those duties, and is sought to be arrested, and taken from the further performance of them, he can be brought before the tribunals of the nation of which he is an officer, and the fact then inquired into.

John T. Carey, United States Attorney; *Richard S. Mesick*, *Samuel M. Wilson*, *William F. Herrin*, *W. L. Dudley*, *C. L. Ackerman*, *J. C. Campbell*, *H. C. McPike*, for petitioner.

G. A. Johnson, Attorney-General of the State of California; *J. P. Langhorne*; *Avery C. White*, District Attorney of San Joaquin County, California, for respondent.

SAWYER, Circ. J., September 14, 1889. The petitioner has sued out a writ of *habeas corpus*, returnable before the Court, alleging that he is unlawfully deprived of his liberty, and imprisoned, by virtue of a warrant issued by a Justice of the Peace of San Joaquin County, in this State, charging him with

a felonious homicide, whilst the act thus characterized was a lawful act performed in the discharge of his duties as an officer of the United States; and the first question presented is, whether this Court has jurisdiction to inquire into the truth of that allegation.

Upon the question of jurisdiction, Section 751, Rev. Stat., provides that—

“The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus* ;”

and Section 752 further provides, that—

“The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.”

There is no limit in these provisions to the jurisdiction of these courts and judges to inquire into the restraint of liberty of any person. But Section 753 prescribes some limitations, among which is—

“The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody * * * for an act done, or omitted, in pursuance of a law of the United States, or of an order, process or decree of a court, or judge thereof; or is in custody, in violation of the Constitution, or of a law or treaty of the United States.”

And this legislation, in the language of the Chief Justice, in *McCardle's case* (1867), 6 Wall. (73 U. S.) 325–6, in commenting upon the same provision in a prior act—

“[This legislation] is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court, and of every judge, every possible case of privation of liberty, contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction.”

And again, in *Ex parte Royall* (1885), 117 U. S. 249, the Supreme Court says—

“[But] as the judicial power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of *habeas corpus* cannot be suspended, unless when in cases of rebellion or invasion, the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union, and of their justices and judges. That the petitioner is held under the authority of a State cannot affect the question of the

power or jurisdiction of the Circuit Court, to inquire into the cause of his commitment, and to discharge him, if he be restrained of his liberty in violation of the Constitution. The Grand Jurors who found the indictment, the Court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all equally with citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, 'any thing in the Constitution and laws of any State to the contrary notwithstanding,' and that equal power does not belong to the courts and judges of the several States; that they cannot under any authority conferred by the State, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the General Government acting under its laws, results from the supremacy of the Constitution and laws of the United States: *Ableman v. Booth* (1858), 21 How. (62 U. S.) 506; *Tarble's Case* (1871), 13 Wall. (80 U. S.) 397; *Robb v. Connolly* (1883), 111 U. S. 624. We are therefore, of opinion that the Circuit Court has jurisdiction, upon writ of *habeas corpus*, to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution."

In the exercise of this jurisdiction there is no conflict between the authority of the State and of the United States. The State in such cases is subordinate, and the National Government paramount.

"The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." *Siebold's case* (1879), 100 U. S. 392; see also *Tennessee v. Davis* (1879), Id. 257-8.

The exclusive authority of the State to determine whether an offense has been committed against the laws of the State, is now earnestly pressed upon our attention. In *Siebold's case*, the Court says—

"It seems to be often overlooked that a National Constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this Government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised toward this Government, in reference to the preservation of our liberties, than is proper to be exercised toward the State governments. Its powers are limited in number and clearly defined, and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the National and State governments shall be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them, according to a fair

and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other." 100 U. S. 394; see *Id.* 266-7.

This Court, then, has jurisdiction to inquire upon this writ into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be "in custody for an act done or committed in pursuance of a law of the United States," then he is in custody in violation of the Constitution and laws of the United States, and he is entitled to be discharged, no matter from whom, or under what authority, the process under which he is held, may have issued—the Constitution and laws of the United States made in pursuance thereof, being the supreme law of the land.

The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the State of California, and only the State can deal with it as such or in that aspect. It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle was an "act done * * * in pursuance of a law of the United States," within the powers of the National Government, then it *is not*, and *it cannot* be, an offense against the laws of the State of California, no matter what the statute of the State may be, the laws of the United States being the supreme law of the land. A State law which contravenes a valid law of the United States, is in the nature of things, necessarily void—a nullity. It must give place to the "supreme law of the land." In legal contemplation there can no more be two valid laws which are in conflict, operating upon the same subject matter at the same time, than in physics two bodies can occupy the same space at the same time.

But, as we have seen by the authorities cited, it is the exclusive province of the Judiciary of the United States to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is, therefore, the prerogative of the National courts to conclusively construe the National statutes and determine whether the homicide in question was the result of an "act done in

pursuance of a law of the United States," and when that question has been determined in the affirmative, the petitioner must be discharged, and the State has nothing more to do with the matter. All we claim is the right to determine the question, was the homicide the result of "an act done in pursuance of a law of the United States?" and if so, discharge the petitioner.

As incidental to and involved in that question, it is necessary to inquire whether the act of the petitioner was performed under such circumstances as to justify it. If it was, then he was in the line of his duty. If not, then it was outside his duty. We do not make the inquiry at all for the purpose of determining whether the act was an offense, or justifiable under the statutes of the State. We do not assume to consider the case in that aspect at all. We simply determine whether it was an act performed in pursuance of a law of the United States. Nor do we act in this matter because we have the slightest doubt as to the impartiality of the State courts, and their ability and disposition to, ultimately, do exact justice to the petitioner. We have not the slightest doubt or apprehension in that particular; but there is a principle involved. The question is, has the petitioner *a right* to have his acts adjudged, and, if found to have been performed in the strict line of his authority and duty, a further right to be protected by that sovereignty whose servant he is and whose laws he was executing? If he has that right, then there is no encroachment upon the State jurisdiction, and this Court must neces-

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the writ should issue, in this case, was not a question of "expediency," and whether the petitioner shall be discharged or remanded is not a question of "policy" or "comity," as suggested in some quarters. It is a question of personal right and personal liberty, arising under the Constitution and laws of the United States, which the Court cannot ignore. There is a class of cases, of which *Ex parte Royall* is an example, in which the Court may exercise a discretion as to the *time* of interference, but, in our opinion, this is not one of them: *Ex parte Royall* (1885), 117 U. S. 251.

But if it rests in our discretion to discharge or remand the petitioner to the State courts, to be there first tried for an offense against the State, while we are satisfied that he is entitled to be discharged, to what useful end would he be sent back, since upon being tried and convicted he would still be discharged by the National courts on *habeas corpus*, if the act should appear to them to have been performed in pursuance of a law of the United States? This would be but to put the State to great useless expense, and subject the petitioner, if guilty of no offense, to unjust imprisonment in violation of his legal rights, until his trial could be had, and his writ of *habeas corpus* afterwards again sued out, heard and decided, when the result, in all probability, would at last be the same. Evidently, public justice demands that the case should be "summarily" decided now, as required by Section 761, Rev. Stat. The Court has no right to trifle with the petitioner's constitutional rights, by unnecessarily subjecting him to unjust imprisonment, great expense and vexatious delays. In case of a remand and conviction, the National courts must hear and decide the case at last. Far better for all concerned, that they should decide it now, and forever end it. We have no desire to usurp a jurisdiction that does not belong to us. We have enough to do in exercising the admitted jurisdiction conferred upon us, without seeking to enlarge it in the smallest particular, but we must perform our duty as we understand it, be the consequences what they may.

The Statutes of the United States also make ample provision for giving full effect to the jurisdiction of this Court in cases where the petitioner alleges that he is restrained of his liberty

in violation of the Constitution or of a law of the United States, in Section 766, which reads as follows, to wit—

“ Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void.”

It is, therefore, only necessary, in order to dispose of the case, to inquire and ascertain whether the petitioner is in custody for an act done in pursuance of a law of the United States.

As we have seen from the statement of facts, Mr. Justice FIELD, of the United States Supreme Court, allotted to the Ninth Circuit, was traveling, officially, from one part of his circuit to another, in pursuance of the requirements of the statutes of the United States, for the purpose of holding a Circuit Court. By reason of threats against his life made by dissatisfied litigants, generally known and published in the newspapers and brought to the knowledge of the United States Marshal for the Northern District of California, and by him called to the attention of the Attorney General of the United States, that officer directed the Marshal to furnish the Justice with protection while thus engaged in the performance of his judicial duties on the circuit. The Marshal, deeming it proper, furnished the necessary protection by assigning that duty to the petitioner, who was a United States Deputy Marshal. The claim is that the petitioner, as such Deputy Marshal, was affording the only protection practicable to Justice FIELD, in the lawful discharge of his duty, when the homicide was committed, and that the killing was necessary for the preservation of the lives of both Justice FIELD and himself, at the time the fatal shot was fired. The homicide was committed at Lathrop, and not upon land purchased by the United States with the consent of the State for the needful uses of the United States, in pursuance of Article I, Section 8, of the Constitution.

Conceding the points to be as stated, do they present a case of an act performed in pursuance of a law of the United States, subject to their jurisdiction and to the jurisdiction of this

Court, and is the petitioner held under an arrest on a charge of murder by the State, "in custody in violation of the Constitution or laws of the United States," within the meaning of the statute?

It is urged that, since the homicide was committed in the State at large, and not in the courthouse, or upon land within the exclusive jurisdiction of the United States, the question as to whether the homicide is murder, is a question arising exclusively under the laws of the State, and that it can be investigated and determined by the State courts alone. It is admitted on the part of the State, that the United States has exclusive jurisdiction over the Custom House Block and "over all places purchased by the consent of the Legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," in pursuance of Section 8, Article I, of the National Constitution, and that the State has no jurisdiction whatever of any offense committed in such places. But it is contended that the United States has no jurisdiction of offenders outside the lands so purchased, in other portions of the State, but that in the State at large the jurisdiction of the State is exclusive. This proposition, like most others urged by those who insist on extreme State rights doctrines, wholly ignores the principle that there can be no legal conflict, or inconsistency, in matters wherein the State is subordinate, and the United States paramount—where the Constitution and laws of the United States are the supreme law of the land. We have already seen that although in certain cases the courts of the United States have jurisdiction to discharge on *habeas corpus*, prisoners held in custody by the State courts in violation of the Constitution and laws of the United States, yet that the State courts "cannot under any authority conferred by the State, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under such laws," and that this "results from the supremacy of the Constitution and laws of the United States." This principle, established in the *Booth* and *Tarble* cases, was recently properly recognized by the Supreme Court of California, when upon the return of the writ of *habeas*

corpus in *Terry's* case, it appearing that he was in custody by virtue of a judgment of the United States Circuit Court, it declined to require the sheriff to produce his body. As the powers and duties of the State and National courts are by no means reciprocal, in this class of cases, so they are not reciprocal in the matter of territorial jurisdiction mentioned, as claimed on the part of the State. The Constitution and laws of the United States, as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of its courts to enforce rights derived thereunder, is as extensive as the territory to which they are applicable.

In *Siebold's case*, the Supreme Court, in reply to an argument in favor of a wide extension of State rights, uses the following language peculiarly applicable to the point now under consideration—

“Somewhat akin to the argument which has been considered, is the objection, that the Deputy Marshals, authorized by the Act of Congress to be created, and to attend the elections, are *authorized to keep the peace*; and that this is a duty which belongs to the State authorities alone. It is argued *that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States*. Here, again, we are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that Government. We hold it to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil, the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.”

“This power to enforce its laws, and to execute its functions in all places, does not derogate from the power of the State to execute its laws, at the same time, and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. ‘This Constitution, and all laws which shall be made in pursuance thereof, shall * * * be the supreme law of the land.’” (100 U. S. 394-5.)

And again—

“The argument is based on a strained and impracticable view of the nature and powers of the National Government. *It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have the power to command obedience, to preserve order and keep the peace; and no person or power in this land*

has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction." (Id. 396.)

The power to keep the peace is a police power, and the United States has the power to keep the peace in matters affecting its sovereignty. There can be no doubt, then, that the jurisdiction of the United States is not affected by reason of the place—the locality—where the homicide occurred. If the locality is a necessary element of jurisdiction, a majority of the offenses created by the statutes would be out of their jurisdiction, and the statutes creating such offenses would be nullities, and practically useless.

For example, for a quarter of a century, the United States Courts in this State were held in rented buildings, owned by private parties. They had no jurisdiction over them, under the provision of Section 8, Article I, of the National Constitution; and no jurisdiction other than that had over other portions of the country to which the Constitution and its laws extended. Had an assault been committed in open Court upon the Judge, in one of these buildings, and the assailing party been slain by the Marshal, in protecting the Judge, under circumstances excusing or justifying the homicide, would it be pretended that the Court would have no jurisdiction to protect him from interference by the State Government? Or, have the United States and its courts no jurisdiction over the offense of resisting a United States Marshal in the lawful execution of the process of the courts? or over the crime of counterfeiting the coin or forging the bonds or other securities of the United States, or other offenses against the laws, unless the offense is committed in a place under the exclusive jurisdiction of the United States? Such a claim would be preposterous.

In the case of *Tennessee v. Davis* (1879), 100 U. S. 257, the defendant was indicted for murder in killing one Haynes, while he was engaged in discharging his duties as a Deputy Collector of Internal Revenue of the United States, which killing Davis claimed was in self defense. The case was removed to the Circuit Court of the United States under Section 643, Rev. Stat. It was contended that this Act was an encroachment upon State rights, since it took away the right of the State to determine and execute its own criminal laws, and was, there-

fore, unconstitutional. The Supreme Court sustained the Act. It was held "that the United States is a government with authority extending over all the territory of the Union, acting upon the State and the people of the State." In deciding the case the Court said—

"As was said in *Martin v. Hunter* (1816), 1 Wheat. (14 U. S.) 363, the 'General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its Constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State Court, for an alleged offense against the laws of the State, yet warranted by the Federal authority they possess, and if the General Government is powerless to interfere at once for their protection; if their protection must be left to the action of the State Court—the operations of the General Government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The State Court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the Government. And even if, after trial and final judgment in the State Court, a case can be brought into the United States Court for review, *the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.*"

"We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its *sovereignty* extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." *Tennessee v. Davis* (1879), 100 U. S. 262-3.

These expositions of the territorial extent of the jurisdiction of the General Government are authoritative and conclusive, and the result is that, wherever the Constitution and laws of the United States operate at all, the State laws in conflict with them are subordinate, and those of the United States are supreme and paramount.

Numerous cases are reported in the books, wherein parties arrested for offenses under the State laws, for acts performed in the discharge of duties imposed by the laws of the United States, have been discharged from imprisonment on *habeas corpus* by the United States Courts, in consonance with these

principles, now authoritatively established by the Supreme Court of the United States, in the cases cited, and others in the same line.

Thus, in *Ex parte Jenkins, and others* (1853), 2 Wall, Jr., 521, Deputy United States Marshals, who were arrested on the warrant of a justice of the peace in Pennsylvania, for shooting and wounding a negro, who resisted an arrest attempted under a warrant issued by the United States Court for a fugitive slave, Mr. Justice Grier, of the United States Circuit Court, took jurisdiction and discharged the petitioners, under the Act of 1835, since carried into the Revised Statutes, as part of section 753, under which this case arises. After their discharge, they were arrested again, in a suit by the negro for trespass, upon a warrant issued by a judge of the Supreme Court of Pennsylvania, and again discharged on *habeas corpus* by the United States Circuit Court. After this they were indicted for the shooting and wounding of the negro, by the grand jury of Luzerne County, and a third time released on *habeas corpus*. In the first of these cases Mr. Justice GRIER observes—

“What, then, have we power to do, on the return of the writ?” “The writ of *habeas corpus* is a high prerogative writ known to the common law: the great object of which is the liberation of those who may be in prison without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. It brings the body of the prisoner up, together with the cause of his commitment. The Court can, undoubtedly, inquire into the sufficiency of that cause.” * * * “Warrants of arrest issued on the application of private informers, may show on their face a *prima facie* charge sufficient to give jurisdiction to the justice; but it may be founded on mistake, ignorance, malice, or perjury. To put a case very similar to the present—A tells B that he has seen C kill D. B runs off to a justice, swears to the murder boldly, without any knowledge of the facts, and takes out a warrant for C, who is arrested and imprisoned in consequence thereof. C prays a *habeas corpus*, and shows that he was the sheriff of the county, and hanged D in pursuance of a legal warrant. If a Court could not discharge a prisoner in such a case, because the warrant was regular on its face, the writ of *habeas corpus* is of little use.”

“The authority conferred on the judges of the United States by this Act of Congress gives them all the power that any other Court could exercise under the writ of *habeas corpus*, or gives them none at all. If under such a writ they may not discharge their officer, when imprisoned ‘by any authority,’ for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the Act was passed. Is the prisoner to be brought before them only that they may *acknowledge their utter impotence to protect him?*”

In *Ex parte Robinson* (1855), 6 McLean 355, Mr. Justice McLEAN held that "a writ of *habeas corpus* may issue to relieve an officer of the Federal Government who has been imprisoned under State authority for the performance of his duty." In the course of the decision the learned Justice observes—

"It is a general principle of law, to which I know of no exception, that the laws of every government shall be construed by itself; and such construction is acted upon by the judiciary of all other countries. By the Federal Constitution, 'the judicial power of the United States is declared to be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time order and establish.' Under this provision, the judiciary of the Union gives a construction to the laws which is obligatory on the State tribunals. The Constitution again declares, 'the Constitution and laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.' " (Id. 362.)

Thus, it is the exclusive prerogative of the National Courts to finally determine, whether an act performed by one of the officers of the United States, and especially an officer of the Court itself, is done in pursuance of a law of the United States, or whether, when under arrest for acts performed in connection with his office, he is "in custody in violation of the Constitution or of a law of the United States."

In the case of *U. S. ex rel. Roberts v. Jailor of Fayette County, Kentucky* (1867), 2 Abb. (U. S.) 265, a special Deputy United States Marshal was arrested, under the State laws, on a charge of murder, for a homicide committed by him in attempting to arrest one Cull upon a warrant issued by a Commissioner of the United States Circuit Court, for offenses charged to have been committed under the internal revenue laws. Upon the hearing, the United States Circuit Court found that the homicide was committed in the performance of "an act done in pursuance of a law of the United States, or of a process of a Court or Judge of the same," and discharged the petitioner. The question of the jurisdiction of the Court, and the facts, were elaborately discussed.

So, *In re Ramsey* (1879), 2 Flip. 451, the prisoner was a Deputy United States Marshal, in custody by order of a State

Court, on a charge of murder, the homicide having been committed in an attempt to arrest, upon a warrant issued by the United States Courts, the party slain. The Court found that the act was done in pursuance of a law of the United States; that petitioner was justified in the act which he performed, and discharged him. See, also to the same effect, *In re Neill* (1871), 8 Blatch. 156, 167; *In re Farrand* (1867), 1 Abb. (U. S.) 140; *Electoral College of South Carolina* (1876), 1 Hugh. C. Ct. 571; *In re Hurst* (1879), 2 Flip. 510, and cases collected in vol. 29 Myers, Fed. Decisions, 698. Thus it appears to be settled, beyond controversy, that, where a party is in custody by State authority, for an act done, or omitted to be done, in pursuance of any specific provision of a statute of the United States, imposing a duty upon him, or for an act performed justifiable by the circumstances of the case, in order to enable him to perform that duty, or in the execution of any order, or process, or decree, of a Court of the United States, or of a Judge thereof, the Courts of the United States have jurisdiction to discharge him on *habeas corpus*, under Section 753 of the Revised Statutes. In such a case, the laws of the United States are supreme, and the act cannot be an offense against the laws of the State, and as we have before seen, whether an act is performed in pursuance of a law of the United States, is a question exclusively for the United States Courts to authoritatively and conclusively determine. They must interpret finally the laws of the United States. With their decision the State cannot interfere. When the United States Courts have spoken on the subject, the State has nothing more to do with it.

The only remaining questions to determine are :

1. Was the homicide now in question, committed by petitioner, while acting in discharge of a duty imposed upon him by the Constitution or laws of the United States, within the meaning of Section 753 of the Revised Statutes?

2. Was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time, and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?

It is urged that there is no statute, which, specifically, makes it the duty of a Marshal, or a Deputy Marshal, to protect the Judges of the United States Courts while out of the courtroom, traveling from one point to another in the circuit, on official business, from the violence of litigants, who have become offended at adverse decisions made by such Judges in the performance of their judicial duties, and that Marshals, or deputies, so engaged, are not within the provisions of Section 753 of the Revised Statutes.

It will be observed that the language of the provision of Section 753 is "an act done * * * in pursuance of a *law* of the United States," not in pursuance of a *statute* of the United States.

The statutes of Congress, in their express provisions, do not present all the law of the United States. Their incidents and implications are as much a part of the law, as their express provisions. When they prescribe duties, provide for the accomplishment of certain designated objects, or confer authority in general terms, they carry with them all the powers essential to effect the ends designed.

[See note on page 624.]

Says the Supreme Court in *Tennessee v. Davis* (1879), 100 U. S. 264, quoting with approbation from Chief Justice MARSHALL—

"It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an Act of Congress to imply, without expressing, this very exemption from State control. * * * The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. *It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any Act of Congress.* It is incidental to, and is implied, in the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone—that is, the judicial power is the instrument employed by the Government in administering this security.' "

If the officers referred to in the preceding passage are to be protected while in the line of their duty, without any special law or statute requiring such protection, are not the Judges of the Courts—the principal officers in a department of the Government second to no other—also to be protected, and are not their executive subordinates—the Marshals and their deputies—to be shielded from harm by the national laws, while honestly engaged in protecting the heads of the Courts from assassination? When it was argued in *Siebold's case* that it was not in the power of the United States to authorize the United States Marshals to "*keep the peace*" at Congressional elections, "*that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belonged exclusively to the State,*" we have seen the answer of the Supreme Court to that argument, in cases where the rights and interests of the *United States Government were involved in the matter of keeping the peace*—

"We hold it to be an incontrovertible principle," said the Court, "that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

And again—

"Why do we have Marshals at all if they cannot physically lay their hands on persons and things, in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the Courts, must they call upon the nearest constable for protection? Must they rely upon him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the National Government out of the United States, and relegate it to the District of Columbia, or perhaps some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old Confederation." 100 U. S., 395-6.

In this particular case, the petitioner, long before he reached Lathrop, endeavored, through the conductor and the proprietor of the eating-house at that place, to have "*a constable*" in readiness, on the arrival of the train, *to keep the peace*, but without success. When too late to prevent the tragedy, the constable appeared and arrested the petitioner, for performing

the duty which it is now claimed devolved exclusively upon himself, or some other peace officer of the State.

Had the United States in this instance relied upon another government—the State of California—to keep the peace as to one of their most venerable and distinguished officers—one of the Judges of their highest Court—in relation to matters concerning the performance of his official duties, they would have leaned upon a broken reed, and there would now in all probability be a vacancy on the bench of one of the most august judicial tribunals in the world, and the deceased—the would-be assassin—might, perhaps, be a tenant of the Stockton jail, to be disposed of by another government. The case affords a striking illustration of the necessity for the United States to protect their own officers while in the discharge of their duties, and by such protection, protect the Nation itself.

The result was, that instead of arresting the conspirator in the contemplated murder—the wife of the deceased, armed with a loaded revolver till relieved of it by a citizen—threatening death to Justice FIELD, calling upon the bystanders to aid her, and attempting to enter the car, with the avowed purpose of compassing his death, the officer of the United States assigned by his Government to the special duty of protecting the Justice's life against these very parties, while in the actual performance of the duties so assigned him, was, himself, arrested, without warrant, and disarmed by an inferior officer of the State, and interrupted in the discharge of those momentous duties, thereby leaving his charge helpless, and without the protection provided by the Government he was serving, at a time when such protection seemed most needed.

Had Neagle been a Deputy Sheriff of San Joaquin County, assigned by his superior to this very duty of protecting the life of Justice FIELD, under the State laws, and, in the performance of his duties, committed the homicide in all other respects under precisely the same circumstances, would he have been arrested by the constable of Lathrop, without a warrant, and disarmed with such inconsiderate haste, and thereby prevented from further performing his duty to protect the life and person of Justice FIELD, leaving him to pursue the remainder of his

journey without protection? Yet the constable was informed that Neagle was acting as a Deputy United States Marshal, under the orders of his superiors, for the protection of the life and person of a Justice of the Supreme Court of the United States.

We do not wish to be regarded as now calmly and deliberately looking back upon the scene, and sitting in judgment upon the action of the constable, or as passing censure upon his zeal. He, doubtless, in the emergency, where time for consideration was short, and the facts not fully appreciated, acted according to the best dictates of his judgment, necessarily hastily formed. But when the State now comes in, after an arrest upon a warrant issued upon such flimsy testimony as that presented, and deliberately claims the exclusive right to sit in judgment upon the acts of the United States Deputy Marshal, performed not upon his own interpretation of the law, but upon that of the Attorney-General of the United States, who may be presumed to possess some knowledge of his powers and duties, it is well to consider the circumstances from a standpoint presenting a view of both sides of the question.

In matters of the public peace, in which the National Government is concerned, the Marshals and Deputy Marshals, within the scope of their authority, *are National peace officers*, with all the statutory and common law powers appertaining to peace officers. Is not the National public peace involved, when a deadly assault is unexpectedly made upon a Judge in open Court, in which the Marshal and his deputies, seeing the assault, are both authorized and bound on their own motion, without any previous order or command, to interpose and use sufficient force to quell the disturbance, and subdue the parties making it? Yet where is there any specific provision of the statute imposing that duty upon them? The Marshal is required to attend Court, but it is not provided what he shall do in Court. To what end shall he be in Court if not to keep order, and, if necessary, to protect the Judges from violence, by force, or any practicable means? But there is no statute requiring it in terms.

The general duties of Marshals are provided for in Section 787, which reads as follows—

"It shall be the duty of the Marshal of each district to attend the District and Circuit Courts when sitting therein, and execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty."

There is no more authority specifically conferred upon the Marshal by this section, to protect the Judge from assassination, in open Court, without a specific order or command, than there is to protect him out of Court, when on the way from one Court to another, in the discharge of his official duties. And the assassination in Court, as well as out of it, might well be accomplished before the Judge would be aware of his danger, and before it would be possible to give a command or order to the Marshal for his protection. The authority exists in the one case, as in the other, from the nature of the office, and the powers arising under the common law, recognized and in use in the country, and, in the nature of things, inherent in the office. The very idea of a government composed of executive, legislative and judicial departments, necessarily comprehends the power to do all things through its appropriate officers and agents, within the scope of its general governmental purposes and powers requisite to preserve its existence, protect it and its ministers and give it complete efficiency in all its parts. It necessarily and inherently includes power in its executive department to enforce the laws, keep the national peace with regard to its officers while in the line of their duty, and protect, by its all-powerful arm, all the other departments and the officers and instrumentalities necessary to their efficiency, while engaged in the discharge of their duties.

In language attributed to Mr. ex-Secretary Bayard, used with reference to this very case, which we quote, not as a controlling judicial authority, but for its intrinsic, sound, common sense—

"The robust and essential principle must be recognized and proclaimed, that the inherent powers of every government which is sufficient to authorize and enforce the judgment of its courts, are, equally, and at all times, and in all places, sufficient to protect the individual judge, who, fearlessly and conscientiously in the discharge of his duty, pronounces those judgments."

Our jurisprudence is derived from and founded upon that of England, and our judges and officers are substantially the

same. They have corresponding duties imposed upon them, and inherently possess corresponding executive powers, to enable them to effectively perform their duties. From the foundation of our Government, many of their common law duties have been performed, and common law powers exercised, without specific or statutory direction, and without question; and the common law principles governing them, except so far as inapplicable, or modified by statute, still remain in force.

The observation of the Supreme Court of California, in the *Estate of Apple* (1885), 66 Cal. 432, in which State a Code has been adopted, with respect to the common law not abrogated or modified by the Code, is applicable here. Said the Court—

“The Code establishes the law of this State respecting the subjects to which it relates; but this, of course, does not mean that there is no law with respect to such subjects except that embodied in the Code. When the Code speaks, its provisions are controlling, and they are to be liberally construed, with a view to effect its objects and promote justice—the rule of the common law that statutes in derogation thereof are to be strictly construed, having been abolished here; but where the Code is silent, the common law governs.”

So here, where the duties of the Marshal are not limited, or specifically defined, by the statute, we must look to the powers and duties of sheriffs at common law for them, so far as those duties come within the purposes and powers of the National Government.

There are many acts and duties daily performed by the Marshals, and by other officers, that are not specifically pointed out or defined by the statute. The Marshals are in daily attendance upon the Judges, and performing official duties in their chambers. Yet no statute specifically points out those duties or requires their performance. Indeed, no such places as chambers for the Circuit Judges, or Circuit Justices, are mentioned at all in the statutes. The Judges' chambers do not appear to have any “local habitation.” The Justices of the Supreme Court at Washington have, in fact, no chambers otherwise than as they study and do their work out of Court, at rooms in their own residences. We have in the San Francisco Courthouse rooms that we call chambers, in which the work of the Judges out of Court is in part, but not wholly, performed. I apprehend that the Marshal would as clearly be authorized

to protect the Judges here in chambers as in the courtroom. All business done out of Court by the Judge, is called chamber business. But it is not necessary to be done in what is usually called chambers. Chamber business may be done, and often is done, on the street, in the Judge's own house, at the hotel where he stops, when absent from home, or it may be done *in transitu*, on the cars in going from one place to another, within the proper jurisdiction to hold court. Mr. Justice FIELD could, as well, and as authoritatively, issue a temporary injunction, grant a writ of *habeas corpus*, an order to show cause, or do any other chamber business for the district, in the dining-room at Lathrop, or in the cars, as at his chambers in San Francisco, or in the courtroom. He could have made a writ of *habeas corpus* returnable before himself on the car, and lawfully heard and decided the case while on his passage to San Francisco. The chambers of the Judge, where chambers are provided, are not an element of jurisdiction, but are a convenience to the Judge, and to suitors—places, where the Judge at proper times can be readily found, and the business conveniently transacted. But the chambers of the Judge, as a legal entity, are something of a myth. For the purposes of jurisdiction, the chambers of the Judge are wherever he happens to be in his circuit, or district, when the exigencies of the case call for the transaction of chamber business, and a Judge is as clearly engaged in the discharge of the duties of his office, when going from one place of holding court to another, for the purpose of holding court, and just as much entitled to protection from his own government against murderous or other assaults, from desperate suitors, on account of his judicial action, as when actually engaged in business at chambers, or in holding court. In England, whence we derive our jurisprudence, the High Sheriff of the shire was the keeper of the King's peace—that is to say, the keeper of the peace of the sovereignty which the King represents. So here, I take it, under the authorities cited, the Marshal is the keeper of the peace of the Government of the sovereignty he serves, within the scope of the supreme powers of that Government. In England, in early days, it was the duty, in every shire, of the sheriffs not only to attend the courts, but to attend the Judges through

their circuits. They met the Judges at the border of the shire, and attended them until they left it at the border of another: Dalton, on the Office and Authority of Sheriffs, chapter 98, p. 369, published in 1682. See also 40 Alb. Law Journal, 161. Such is also understood to have been the practice in early days in a number of the States. From the advancing state of civilization this practice has, doubtless, generally become unnecessary for the safety of the Judges, and it has fallen into desuetude. But it does not follow that the power to thus protect them has been abolished or become extinguished. It simply remains latent or dormant, ready to be called into action whenever the exigencies of the case or times require it. And how could there possibly be a more urgent occasion for reviving the practice and calling it into action, than the recent journey of Justice FIELD to Los Angeles and return on official business?

Upon general, immutable principles, the power must necessarily be inherent in the executive department of any government worthy the name of government, to protect itself in all matters to which its authority extends, and this necessarily involves the power to protect all the agencies and instrumentalities necessary to accomplish the objects and purposes of that government. In the National Government of the United States, the judiciary constitutes one of its most important branches. Unlike the judiciary of other nations, it is invested with the jurisdiction to pass, finally and conclusively, upon the powers of the legislative and executive departments of the Government, and to confine them within their constitutional limits. It is, therefore, the balance wheel of the National Government, that keeps it running regularly and smoothly within its proper domain. Impotent, indeed, must be the executive branch of the Government, if it is not empowered to protect the lives of the Judges of the highest branch of its judiciary, from assault and assassination, on account of their judicial decisions, by desperate disappointed litigants, while passing from point to point within their territorial jurisdiction in the discharge of their high functions and duties. We cannot think the power can be wanting, even if there were no constitutional or statutory provision governing the case. It seems impossible that the National Government should be left to the mercy,

good will, or complacency of the State, to afford that protection to its Judges, that the United States, if worthy to be called a Nation, are bound themselves to furnish.

As a further example of laws, not ordained by specific statutory enactments, see those respecting punishment for contempts. For forty years after the organization of the National Government, down to 1831, there was no statute which specifically defined contempts of court: *Ex parte Robinson* (1873), 19 Wall. (86 U. S.) 510; *Ex parte Terry* (1888), 128 U. S. 302-3; *Ex parte Savin* (1888), 131 Id. 275. But the courts, nevertheless, exercised the power, necessarily, from the nature of things inherent in every court, to protect itself, its dignity and its officers, by the punishment of many acts as contempts of its authority. The first specific Act upon the subject passed by Congress, was not an Act enlarging the power of the court, but it was, on the contrary, a restriction of the powers already exercised within certain defined limits. The act was passed at the instance of Senator Buchanan, to limit the power of the court theretofore exercised, to punish for contempts, as a sequel to the impeachment of a United States Judge for the District of Missouri. The Act was passed March 2, 1831, and is entitled, "An Act declaratory of the law concerning Contempts of Court:" 4 U. S. Stat. at Large, 487. The first section does not *grant* the power to punish for contempts, but expressly recognizes the existing power, and, in express terms, thereafter limits the power to certain enumerated cases. In order that those who were before subject to punishment for contempt should not escape the penalties due their acts, section 2 of the statute makes certain acts, before punishable as contempts, offenses against the laws of the United States, punishable by the less summary and more deliberate proceeding on indictment and trial by a jury. Many of the acts under that Act recognized as punishable as contempts, as being necessary to the prompt and summary vindication of the authority of the court, are also indictable offenses under other statutes.

This statute of 1831 has been carried into the Revised Statutes, Section 1 of that Act having been re-enacted in Section 725 of the Revised Statutes, giving it a granting, as well as a restricting form, but in no sense changing its purpose or

meaning. And Section 2 is now found in Section 5399 of the Revised Statutes, as a part of the criminal code of the Nation.

Did anybody ever doubt, or does anybody now doubt, that the power of the United States Courts to punish contempts, from the organization of the Government down to 1831, was just as ample, and that it was just as much a part of the law of the United States, inherently vested in the Courts, as it was after the passage of the Act of 1831, or as it is now under the same provisions carried into the Revised Statutes?

Yet there was no specific provision of the statutes defining contempts. It was a power, however, necessarily inherent in the Courts. It is involved in the very idea of a Court, having power to administer the laws of the land. It would be impossible for Courts to perform their functions and administer the laws without it. And as so inherent, the power to punish various acts not mentioned for contempt was as much a part of the law of the United States as if ordained by a specific provision of the Statutes of the United States, and the authority of the Marshal to protect the Judges is a cognate power, also necessarily inherent in the office he holds. Thus there is much law of the United States, not now found in terms in the Statutes, but as valid and binding upon the people, and upon the States, as if it were specifically and definitely therein expressed. See *U. S. v. Hudson* (1812), 7 Cranch (11 U. S.) 32-4; *Matter of Mcador* (1869), 1 Abb. (U. S.) 324; *In re Buckley* (1886), 69 Cal. 18.

But we are not without constitutional and statutory provisions, broad enough and specific enough, as we think, to cover the case. The National Constitution, providing a government for sixty-five millions of people, covers but a very few pages, but it seems to be amply sufficient for the purposes intended. In prescribing the duties of the President, in the terse but comprehensive language of Section 3, Article II, it provides that "he shall take care that the laws be faithfully executed." This makes him the executive head of the Nation, and gives him all the authority necessary to accomplish the purposes intended—all the authority necessarily inherent in the office, not otherwise limited. Congress, in pursuance of powers vested in it, has provided for seven departments, as

subordinate to the President, to aid him in performing the executive functions conferred upon him. Section 346, Rev. Stat., provides that one of the executive departments shall be "known as the Department of Justice," and that there shall be "an Attorney-General, who shall be the head thereof." He has general supervision of the executive branch of the National Judiciary, and Section 362 provides, as a portion of his powers and duties, that—

"The Attorney-General shall exercise general superintendence and direction over the Attorneys and Marshals of all the districts of the United States and Territories as to the manner of discharging their respective duties; and the several District Attorneys and Marshals are required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct."

Section 788, Rev. Stat., provides that—

"The Marshals and their deputies shall have, in each State, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

By Section 817 of the Penal Code of this State, the sheriff is a "peace officer." By section 4176, Pol. Code, he is "to preserve the peace" and "prevent and suppress breaches of the peace." The Marshal is, therefore, in accordance with the decision of the Supreme Court already referred to, and under the provisions of the statute above cited, "a peace officer," so far as keeping the peace, in any matter wherein the National powers of the United States are concerned, and as to such matters he has all the powers of the sheriff, as a peace officer, under the laws of the State. He is, in such matters, "to preserve the peace" and "prevent and suppress breaches of the peace." An assault upon, or an assassination of, a Judge of a United States Court, while engaged in any matter pertaining to his official duties, on account, or by reason, of his judicial decisions, or action in performing his official duties, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the Marshal, or his deputies, to prevent, as a peace officer of the National Government. Such an assault is not merely an assault upon the person of the Judge, as a man. It is an assault upon the National Judiciary, which he represents, and through

it an assault upon the authority of the Nation itself. It is, necessarily, a breach of the National peace. As a National peace officer, under the conditions indicated, it is the duty of the Marshal and his deputies to prevent a breach of the National peace by an assault upon the authority of the United States, in the person of a Judge of its highest Court, while in the discharge of his duty. If this be not so, in the language of the Supreme Court before cited, "Why do we have Marshals at all?" What useful functions can they perform in the economy of the National Government?

The Constitution of the United States provides for a Supreme Court, with jurisdiction more extensive in some particulars than that conferred on any other national judicial tribunal. If the Executive Department of the Government cannot protect one of these Judges, while in the discharge of his duty, from assassination, by dissatisfied suitors, on account of his judicial action, then it cannot protect any of them, and all the members of the Court may be killed, and the Court itself exterminated, and the laws of the Nation by reason thereof, remain unadministered and unexecuted. The power and duty imposed on the President to "take care that the laws are faithfully executed," necessarily carries with it all power and authority necessary to accomplish the object sought to be attained, and, certainly, the power and duty to protect from the deadly assaults of desperate suitors, the lives of the Judges of the highest Court in the Nation, while engaged in the lawful discharge of their duties.

As we have before seen, neither Constitution nor Statutes can, or do, anticipate and point out, specifically, every possible right or duty to be covered and secured. They must, necessarily, be general. In the passage already cited from *Tennessee v. Davis*, the Supreme Court, in speaking of certain officers, says—

"It has never been doubted, that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any Act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the Government in administering this security." (100 U. S. 265.)

And in *United States v. Macdaniel* (1833), 7 Pet. (32 U. S.) 14, similar views were expressed. Said the Court—

“A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he *must* show a statutory provision for every thing he does. *No government could be administered on such principles. * * * There are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the Government.*”

These observations are especially and forcibly applicable to the terse but very comprehensive provisions of the Constitution and of the several statutes cited, as to the powers and duties of the President, the Attorney-General and Marshals.

The act of the Attorney-General in directing the United States Marshal to protect the life of Mr. Justice FIELD against the assaults of the deceased and his wife, is, in legal contemplation, the act of the President. The President speaks and acts through the heads of the several executive departments, in relation to subjects which appertain to their respective duties. They are but the subordinates of the President, wielding his power: *Wilcox v. Jackson* (1839), 13 Pet. (38 U. S.) 513; *United States v. Cutter* (1856), 2 Curt. C. Ct. 617. In the former case, relating to a reservation of land by the Secretary of War, the Court said—

“Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties.”

See also 7 Attorney-General's Opinions, 480-1, Id. 433-479; *Confiscation cases* (1873), 20 Wall. (87 U. S.) 108-9; *United States v. Eliason* (1842), 16 Pet. (41 U. S.) 291.

By Section 788 Rev. Stat., and the several provisions of the Statutes of California herein cited, the United States Marshal is made a peace officer, and as such he is authorized to preserve the peace, so far as a breach of the peace affects the authority of the United States and obstructs the operations of the Government and its various departments. The Courts must, from the nature of things, be enabled fully to perform all their func-

tions imposed upon them by the Constitution and laws, without hindrance or obstruction, and they must have the inherent power to protect themselves by and through their executive officers, under the direction and supervision of the Attorney-General and the President, against obstruction and hindrance in the performance of their judicial duties. An assault upon a Judge in Court, or a Judge out of Court, while in the performance of his duty, induced by his judicial action, and intended or calculated to obstruct him in, or deter him from, a free and full discharge of his duty, is a breach of the National peace affecting the sovereignty of the Nation, and tending to obstruct *and impair* the operations and efficiency of one of the most important departments of the Government. As such, it is the duty of the United States Marshal, under the police powers of the Nation so conferred upon him, by the statutes cited, and as a National peace officer, to prevent such breach of the peace. Under the State laws, deputy sheriffs, when occasion requires, constables and police officers of cities are assigned to certain districts, to watch over the safety of the citizens and to guard and protect their persons and property from assault, destruction or injury—in short, *to prevent the commission of crimes*, etc. These officers in cities are found everywhere, night and day, guarding the citizen and his property from injury. So, the Attorney-General, under the provisions of the statute cited, and the President under the provisions of the Constitution, requiring him to see that the laws are faithfully executed, are authorized and empowered to direct the assignment by the Marshal, of any deputy, to perform any special National police duty within his jurisdiction, arising out of the statutes, whether by express provision or necessary implication, and under any power, necessarily inherent in the President and Government, in order to give full effect and efficiency to the Government, or any of its departments. It has never, so far as we are advised, been doubted that a Marshal, or Deputy Marshal, is authorized to protect a Judge and preserve order in open Court, even by the use of force, without any special order or command, as a part of the duties necessarily inherent in his office; yet, as we have already seen, there is no more specific statutory authority for so preserving order, and protecting the Judge in Court, than

for performing the same duty, under proper conditions, for a Judge engaged in performing his duties, of whatever nature, out of Court.

It is argued by one of the counsel on behalf of the State that these matters pertain exclusively to the peace of the State, and that the State has not only power to preserve the public peace, but that it is amply capable of performing this service; that it is its duty to do it; that the threats of the deceased were matters of public notoriety; and that by calling the powers of the State into action, Justice FIELD's life might have been protected by the State, and there would have been no necessity whatever for what is called on the part of the State, the illegal action of the United States Marshal. It may be conceded, and it is undoubtedly true, that it was an imperative duty of the State to preserve the public peace, and to amply protect the life of Mr. Justice FIELD, *but it did not do it*. Where would Mr. Justice FIELD have been to-day, had he relied solely upon the State to perform her conceded imperative duty?

Not having performed that obligation while on his journey in discharge of his judicial duties, does a complaint now come with a good grace from the State, against the United States, for performing it for her, as well as for the National Government, by protecting one of its most distinguished judicial functionaries through one of its own officers, in the only manner in which it could have been effectively performed?

In the present case, and on this official journey, there was a necessity for the kind of protection afforded Mr. Justice FIELD, for no other kind would have been adequate. The occasion required a preventive remedy.

The use of the State police force would have been impracticable, as the powers of the sheriff would have ended at the borders of his county, and of other township and city peace officers, at the boundaries of their respective townships and cities. Only a United States Marshal, or his deputy, could exercise these official functions throughout the United States judicial district, and, as we have seen, the powers exercised concern matters affecting the peace of the National Government, and if the National Government has no authority to act in the premises, it certainly ought to have such power.

The only remedy suggested on the part of the State, was to arrest the deceased and hold him to bail to keep the peace under Section 706 of the Penal Code, the highest limit of the amount of bail being \$5000. But although the threats are conceded to have been publicly known in the State, no State officer took any means to provide this flimsy safeguard.

Perhaps counsel intended to intimate that it was not the duty of the State, but of Mr. Justice FIELD himself, to set in motion proceedings under the law furnished by the State, to put the decedent under bonds to keep the peace. Has it come to this, then, that a Justice of the Supreme Court of the United States, when in obedience to the behests of the law, he comes to California to perform his judicial duties, must submit to the humiliation of immediately upon his arrival, stealing away to some justice of the peace and instituting proceedings to bind over to keep the peace, vindictive and dangerous litigants who have threatened his life? But what security to Mr. Justice FIELD would a bond of \$5000 afford against resolute, violent and desperate parties, for whom the penalties for murder have no deterring power? The United States Marshal, the United States Attorney for the District of California, the Attorney-General of the United States at Washington, and the mass of the people of California, thought that the exigencies of the occasion required something more, and the result fully justified their view of the matter.

Although no adequate means of protection were afforded by the State on his late official journey, and Mr. Justice FIELD would, in all probability, not now be among the living, had not the petitioner, by the wise forethought of the Attorney-General, been detailed to protect his life, yet the fact of the failure of the State to perform its duty does not afford any reason for taking the petitioner out of the custody of the State, unless, in committing the homicide, he was engaged in the performance of "an act done * * * in pursuance of a law of the United States," and the killing was justifiable. The failure to perform its duty would not, alone, oust the jurisdiction of the State, if it be exclusive. But since the possible remedy mentioned under the State law was alluded to by counsel as ample, we refer to it as illustrating the neces-

sity for a speedy amendment of the laws of the United States, if they are now so defective as to afford no protection to the United States Judges in the performance of their high functions.

It is apparent to us, if he is not now so protected, that the distinguished Justice allotted to the Ninth Circuit, and also his associates, should have thrown over them the protecting ægis of the laws of that Government which he has so long, faithfully and efficiently served.

After mature consideration, we have reached the conclusion that the homicide in question was committed by petitioner while acting in the discharge of a duty imposed upon him by the Constitution and laws of the United States, within the meaning of the provisions of Section 753 of the Revised Statutes.

It only remains to inquire, secondly, was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?

The answer to this proposition is really included in the answer to the last, but we desire to make some observations bearing especially upon it.

The Attorney-General and counsel for the State declined to discuss the question as to whether the homicide was justifiable, because, in their view, this is a question solely for the State Courts, the case, as claimed by them, not being within the provisions of Section 753 of the Revised Statutes, and, therefore, not within the jurisdiction of this Court. Holding as we do, that the case falls within those provisions, so far as the petitioner was authorized to act by the Constitution and laws of the United States, it becomes necessary to determine whether the homicide was justifiable. For, if it was malicious, wanton or reckless, without any reasonable apparent necessity in order to fully and properly perform his duty of protecting Justice FIELD, then it was an act performed beyond and outside his duty, and he is amenable to the State Courts.

The facts set forth in the petition, and in the traverse to the return of the Sheriff, are fully and satisfactorily proved by the testimony, and whether we determine the case upon demurrer

to the traverse, or upon the whole case, as presented in the record and evidence, the result must be the same.

Were the question of justification to be determined by the laws of the State of California, or in the State Courts, there could be no ground for doubt. Says the Penal Code—

"Homicide is also *justifiable* when committed by any person when resisting any attempt to murder any person, * * * or to do some great bodily injury upon any person." (Sec. 197, Penal Code.)

But we shall consider the question without reference to the statute of California.

It is unnecessary to repeat the facts in full. When the deceased left his seat, some thirty feet distant, walked stealthily down the passage in the rear of Justice FIELD and dealt the unsuspecting jurist two preliminary blows, doubtless by way of reminding him that *the time for vengeance* had at last come, Justice FIELD was already at the traditional "wall" of the law. He was sitting quietly at a table, back to the assailant, eating his breakfast, the side opposite being occupied by other passengers, some of whom were women, similarly engaged. When, in a dazed condition, he awoke to the reality of the situation and saw the stalwart form of the deceased, with arm drawn back for a final mortal blow, there was no time to get under or over the table, had the law, under any circumstances, required such an act for his justification. Neagle could not seek a "wall" to justify his acts, without abandoning his charge to certain death. When, therefore, he sprang to his feet and cried, "Stop! I am an officer," and saw the powerful arm of the deceased, drawn back for the final deadly stroke, instantly change its direction to his left breast, apparently seeking his favorite weapon, the knife, and at the same time heard the half-suppressed disappointed growl of recognition of the man who, with the aid of half a dozen others, had finally succeeded in disarming him of his knife at the courtroom a year before, the supreme moment had come, or, at least, with abundant reason, he thought so, and fired the fatal shot. The testimony all concurs in showing this to be the state of facts, and the almost universal consensus of public opinion of the United States seems to justify the act. On that occasion, a second, or two seconds, signified, at least, two valuable lives,

and a reasonable degree of prudence would justify a shot one or two seconds too soon, rather than a fraction of a second too late. Upon our minds the evidence leaves no doubt whatever that the homicide was fully justified by the circumstances.

We have seen in an Eastern law journal, but with its disapproval, some adverse criticism upon the action of the petitioner, attributed to a quarter ordinarily entitled to great consideration and respect. But it is not for scholarly gentlemen of humane and peaceful instincts—gentlemen, who, in all probability, never in their lives, saw a desperate man of stalwart frame and great strength in murderous action—it is not for them sitting securely in their libraries, 3000 miles away, looking backward over the scene, to determine the exact point of time when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. It is not for them to say that the proper time had not yet come. To such, in all probability, the proper time would never come. Neagle on the scene of action, facing the party making a murderous assault, knowing by personal experience his physical powers, and his desperate character; and by general reputation, his life-long habit of carrying arms, his readiness to use them, and his angry, murderous threats, and seeing his demoniac looks, his stealthy assault upon Justice FIELD from behind, and, remembering the sacred trust committed to his charge—Neagle, in these trying circumstances, was the party to determine when the supreme moment for action had come, and if he honestly acted with reasonable judgment and discretion, the law justifies him, even if he erred. But who will have the courage to stand up in the presence of the facts developed by the testimony in this case, and say that he fired the smallest fraction of a second too soon?

In our judgment he acted, under the trying circumstances surrounding him, in good faith and with consummate courage, judgment and discretion. The homicide was, in our opinion, clearly justifiable in law, and in the forum of sound, practical common sense—commendable. This being so, and the act having been "done * * * in pursuance of a law of the United States," as we have already seen, it cannot be an offense against, and he is not amenable to, the laws of the State.

Let the petitioner be discharged.

NOTE.—The report of this case, as published immediately after its delivery, is incorrect, as the third paragraph on page 605 erroneously reads: "The principles of the common law, so far as they are applicable, and as they have been recognized, and as they are in force under the Constitution, not modified or repealed by the National Statutes, and the usages generally long acted upon, are as much a portion of the laws of the United States, as are the Statutes themselves. So, also, where the Statutes point out duties, provide for the accomplishment of many objects, or confer authority in general terms, they carry with them, by implication, all the powers, duties, exemptions, and authority necessary to carry out and accomplish all the purposes and objects intended to be secured thereby."

Note should also be made of the fact that the Grand Jury of the county where the assault upon Justice FIELD occurred, did, after the discharge of Neagle by the United States Court, make a report, finding the shooting of Terry to have been intentional and deliberate, but noting that Neagle had been taken from the power of the State by process of the United States Court, from whose decision the Grand Jury inferred that Neagle could not be tried in any Court.

As this case is likely to be a leading case upon the rights and duties of the officers and courts of the United States, the following annotation is directed chiefly towards a further presentation of the authorities relied upon by the learned Judge.

The opinion embraces two propositions concerning the power of the United States Courts.

1. To inquire, by a *habeas corpus* proceeding, into the detention of any petitioner, and to discharge him from any custody, if he is held in violation of the Constitution of the United States.

2. To decide, in exclusion of the State Courts, whether an act has been done in pursuance of a law of the United States.

Under the second head, the Courts will decide, not only whether the act was done in performance of a right or duty, but also whether it was done in a manner justified by the Constitution and laws of the United States alone.

The logical order of presenting the authorities having been, very naturally, adopted by the learned Judge in his opinion, the chronological order will generally be pursued here, as indicating from one of two political stand-points, the rise or the declaration of this truly august and National power.

The Judiciary Act of 1789 (1 Stat. at L. 82), enacts: § 14. That either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment; *Provided*, That writs of *habeas corpus* shall, in no case, extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

This section is now incorporated into sections 751, 752 and 753, of the Revised Statutes, and in its original form, is manifestly inapplicable to the Neagle case. But the decisions made, down to 1833, in cases where the supervising authority of the United States Courts was established, are the more valuable as laying a broad foundation for the power to coerce any State, or State official, which might interfere with the actions of any officer of the United States. Without seeking to exhaust the decisions *pro* and *con*, the following appear to sufficiently show all that was

said before the supreme authority of the United States Courts in National questions was firmly established.

Chisholm v. Georgia (1793), 2 Dall. 419, was the early and great case where one of the United States was held suable by a citizen of another State. Of course such a decision was too much alike for State's Rights men and for State's Immunity men, and the Eleventh Amendment put an end to the collection of debts due and justly owing by a State. It is to be hoped that the time of public honesty may be approaching when this amendment will be so amended as to read that, "The judicial power of the United States shall extend to any suit in law or equity, commenced or prosecuted against the United States, or any one of them, by citizens of the United States, or by citizens or subjects of any foreign State."

The Court was composed of IREDELL, J., who dissented; BLAIR, J., WILSON, J., CUSHING, J., and JAY, C. J., who all agreed in the judgment of the Court. The remarks of the judges on the subject of State sovereignty are worthy of note, though the case was one of a purely civil nature, being an action of *assumpsit*.

The second section of the Third Article of the Constitution provides: "1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party: to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between

a State, or the citizens thereof, and foreign States, citizens or subjects."

Commenting on this section, IREDELL, J. (dissenting), said: "The Constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases, but in respect to the subject matter upon which such jurisdiction is to be exercised, used the word 'controversies' only. The Act of Congress [the Judiciary Act of 1789, § 13,] more particularly mentions civil controversies, a qualification of the general word in the Constitution, which, I do not doubt, every reasonable man will think well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which, in all instances that respect the same government only, are uniformly considered of a local nature, and to be decided by its particular laws:" *Id.* 431-2.

The dissenting opinion proceeds:—"The powers of the General Government, either of a Legislative or Executive nature, or which particularly concern Treaties with Foreign Powers, do, for the most part (if not wholly), affect individuals, and not States: they require no aid from any State authority. This is the great leading distinction between the old Articles of Confederation and the present Constitution. The judicial power is of a peculiar kind. It is, indeed, commensurate with the ordinary Legislative and Executive powers of the General Government, and the power which concerns treaties. But it also goes further. Where certain parties are concerned, although the subject of the controversy does not relate to any of the special objects of authority of the General Government, wherein the separate sovereignties of the States are blended in one common mass of supremacy, yet the General Government has a judicial authority in regard to such subjects of

controversy, and the Legislature of the United States may pass all laws necessary to give such judicial authority its proper effect. So far as the States, under the Constitution, can be made legally liable to this authority, so far, to be sure, they are subordinate to the authority of the United States, and their individual sovereignty is, in this respect, limited. But it is limited no farther than the necessary execution of such authority requires:" *Id.* 435, 436.

BLAIR, J. (one of the majority of the Court), more instructively said: "If sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that, when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty:" *Id.* 452.

WILSON, J. (another of the majority of the Court), went further into general and decisive principles: "This is a case of uncommon magnitude. One of the parties to it is a STATE; certainly respectable, claiming to be *sovereign*. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others more important still; and may, perhaps, be ultimately resolved into one no less *radical* than this—do the people of the United States form a NATION? * * * * As a judge of this Court, I know and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the *Union*, as a part of the 'People of the United States,' did *not* surrender the supreme, or sovereign power to that State; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, Georgia is NOT a sovereign State. * * *

Whoever considers, in a combined and comprehensive view, the *general texture* of the Constitution, will be satisfied that the people of the *United States* intended to form themselves into a Nation, *for national purposes*. They instituted, for *such* purposes, a National Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all these powers, extending over the whole Nation. Is it congruous that with regard to *such* purposes, any man, or body of men, any person natural or artificial, should be permitted to claim, successfully, entire exemption from the jurisdiction of the National Government? Would not such claims, crowned with success, be repugnant to our very existence as a Nation?" *Id.* 453, 457, 465.

These observations of Judge WILSON should be compared with those of McKEAN and the Virginia judges, as well as of the Wisconsin Court, later on in this annotation.

CUSHING, J. (another of the majority of the Court), said: "As to corporations, all States whatever are corporations or bodies politic. The only question is, what are their powers? As to individual States and the *United States*, the Constitution marks the boundary of powers. Whatever power is deposited with the *Union*, by the people, for their own necessary security, is so far a curtailing of the power and prerogatives of States. * * * So that I think, no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole:" *Id.* 468.

JAY, C. J. (the last of the majority of the Court), discussed the question of State sovereignty on the same lines, and summed up the opinions of the Court in a few words: "Sovereignty is the right to govern; a Nation, or State sovereign, is the person or persons in whom

that resides. In *Europe*, the sovereignty is generally ascribed to the *Prince*; here it rests with the people; there, the sovereign actually administers the government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in *Europe* stand to their sovereigns. Their *Princes* have *personal* powers, dignities and pre-eminences, our rulers have none but *official*; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens:" *Id.* 472.

This is noteworthy, as the same sentiments are offered to-day as a palliative to those who magnify State citizenship. The same people, only different forms of government for different purposes; this is the burden of the recent opinions mentioned in this annotation.

As to the general canon of construction, the Chief Justice proceeded to consider that, among the six objects embraced in the design of the Constitution, the second was, *To establish justice*. "It may be asked, what is the precise sense and latitude in which the words to *establish justice*, as here used, are to be understood? The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the second section of the Third Article, where is ordained, that the judicial power of the *United States* shall extend to ten descriptions of cases. * * * This extension of power is *remedial*, because it is to settle controversies. It is, therefore, to be construed liberally. * * * When power is thus extended to a *controversy*, it necessarily, as to all judicial purposes, is also extended to those between whom it subsists:" *Id.* 476.

Comm. v. Cobbett (1798), 3 Dall. (Pa.) 467, was a case where the State Court refused to allow the removal to the United States Circuit Court, by an

alien, of a suit against him. The ground taken by the Pennsylvania Court was that the Supreme Court of the United States had the sole jurisdiction over civil suits to which a State was a party, and that this was a criminal suit, and not a civil suit. The remarks of Chief Justice MCKEAN, which were afterwards quoted by the Virginia Supreme Court of Appeals (*infra*, page 629), would undoubtedly be characterized, at this day, as *dicta*, as he said, "Previous to the delivery of my opinion in a cause of such importance as to the consequences of the decision, I will make a few preliminary observations on the Constitution and laws of the United States of America:" *Id.* 473. As a part of the "preliminary observations," so heartily approved by the Virginia Judge, the following words were used: "The Government of the United States forms a part of the government of each State; its jurisdiction extends to the providing for the common defence against exterior injuries and violence, the regulation of commerce and other matters specially numerated in the Constitution; all other powers remain in the individual States, comprehending the interior and other concerns; these combined form one complete government. Should there be any defect in this form of government, or any collision occur, it cannot be remedied by the sole act of the Congress, or of a State; the people must be resorted to, for enlargement or modification. If a State should differ with the United States about the construction of them, there is no common umpire but the people, who should adjust the affair by making amendments in the constitutional way, or suffer from the defect. In such a case, the Constitution of the United States is federal; it is a league or treaty, made by the individual States, as one party, and all the States, as another party. * * * There is no

provision in the Constitution, that in such case, the judges of the Supreme Court of the United States shall control and be conclusive; neither can the Congress, by a law, confer that power:" *Id.* 473, 474.

The United States v. Hudson & Goodwin (1812), 7 Cranch (11 U. S.) 32, was a case certified from a Circuit Court of the United States, upon a division of opinion, whether the Circuit Court had common law jurisdiction in cases of libel. The Supreme Court, composed of MARSHALL, C. J., and WASHINGTON (*absent*), JOHNSON, LIVINGSTON, TODD, DUVALL and STORY, J. J., held that all exercise of criminal jurisdiction in common law cases was not within the implied powers of the courts of the United States: *Id.* 34. The opinion of the majority of the Court was delivered by JOHNSON, J., who said: "The powers of the General Government are made up of concessions from the several States; whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of these concessions; that power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it:" *Id.* 33.

Martin v. Hunter's Lessee (1816), 1 Wheat. (14 U. S.) 304, was a writ of error from the Court of Appeals of Virginia, founded upon the refusal of a State Court, for the first time (*Id.* 342), to obey the mandate of the Supreme Court of the United States, granted in 1813, in the same case (*sub nom. Fairfax's Devisee v. Hunter's Lessee*, 7

Cranch (11 U. S.) 603), where the State Court had denied a right under the treaty of 1794, with Great Britain. The jurisdiction of the United States Court thus became the point in issue. The Virginia Court had answered the mandate of the Supreme Court of the United States, by entry of judgment, "that the appellate power of the Supreme Court of the United States does not extend to this Court * * * [and] that the proceedings [on the previous writ of error], in the Supreme Court, were *coram non iudice*, in relation to this Court:" a proposition not denied by the Supreme Court, if the premises had been sound: *Elliott v. Pierson* (1828), 1 Peters (26 U. S.) 328, 340. Speaking of the third article of the Constitution which creates and defines the judicial power of the United States, STORY, J., said: "It is a part of the very same instrument which was to act, not merely upon individuals, but upon States; and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others:" *Id.* 328.

This language is important, for JOHNSON, J., in a separate opinion, said: "It will be observed in this case, that the Court disavows all intention to decide on the right to issue compulsory process to the State Courts." He then goes on to use the words quoted above (page 601), in immediate connection with his alarm over the asserted power of every State Court to decide whether the United States Supreme Court had exceeded its powers. The unanimous opinion of the Court was against any such power. The Court was again composed of MARSHALL, C. J., WASHINGTON, JOHNSON, LIVINGSTON, TODD, DUVALL and STORY, J. J.

A curious feature of the *dicta* contained in this concurring opinion will be apparent from a quotation: "Sup-

pose a foreign minister, or an officer acting regularly under authority from the United States, seized to day, tried to-morrow, and hurried the next day to execution. Such cases may occur, and have occurred in other countries. The angry, vindictive passions of men have too often made their way into judicial tribunals, and we cannot hope forever to escape their baleful influence. In the case supposed, there ought to be a power somewhere, to re-train, or punish, or the Union must be dissolved. At present, the uncontrollable exercise of criminal jurisdiction is most securely confided to the State tribunals. The courts of the United States are vested with no power to scrutinize into the proceedings of the State courts in criminal cases; * * * and extreme, indeed, I flatter myself, must be the case in which the General Government could ever be induced to assert this right. If ever such a case should occur, it will be time enough to decide upon their constitutional power to do so:" *Id.* 377.

The case in the Supreme Court of Appeals of Virginia is reported in 4 Munf. 1 (April, 1814), and the judges gave separate opinions. CABELL, J., said: "The Constitution of the United States contemplates the independence of both governments, and regards the *residuary* sovereignty of the States as not less inviolable than the *delegated* sovereignty of the United States. It must have been foreseen that controversies would sometimes arise as to the boundaries of the two jurisdictions. Yet the Constitution has provided no umpire, has erected no tribunal, by which they shall be settled:" *Id.* 9. Again, "what that Constitution is, what those laws and treaties are, must, in cases coming before the State courts, be decided by the State judges, *according to their own judgments, and upon their own responsibility.* To the opinions of the Federal Courts they may always pay the respect

which is due to the opinions of other learned and upright judges; * * * but it is *respect* only, and not the acknowledgment of *conclusive authority*:" *Id.* 11. That is, "the powers vested by the Constitution, in the Congress of the United States, were delegated for purposes essential to the general welfare, and ought not to be defeated or impaired; and I have no doubt that one of these powers is that of making all laws, necessary and proper, for extending the judicial power of the United States, to *all* the cases, to which the Constitution declares that that power shall extend. I must not, however, be understood as impeaching the concurrent jurisdiction, *original and final*, of the State courts, *provided the parties shall elect their jurisdiction*:" *Id.* 15.

BROOKE, J., said: "The oath to support the constitution, with a strong responsibility to those from whom all power is derived, seem to be the only sanctions against the exercise of power not given by the people. That oath, which is prescribed by the sixth article, imposes no subordination upon those to whom it is administered: it is common to all who exercise power under either [State or Federal] government:" *Id.* 24.

ROANE, J., also based his concurring opinion upon the case in the Supreme Court of Pennsylvania: *Comm. v. Cobbett* (1798), 3 Dall. (Pa.) 467, *supra*. The Judge said: "One of the appellee's counsel was pleased to call this decision a *dictum* of Chief Justice McKEAN'S. I must be excused for saying it is no *dictum*, nor is it the sole and undivided opinion of that respected judge. It is the solemn and unanimous decision and resolution of the Supreme Court of one of the most respected States in the Union. * * * I consider this decision by the Supreme Court of Pennsylvania, as a complete and solemn authority, to show, that in case of a differ-

ence of opinion between the two governments [State and Federal], as to the extent of the powers vested by the Constitution, while neither party is competent to bind the other, the courts of each have power to act upon the subject:" *Id.* 53.

The effect of uniformity of decision, by the United States Judges, was also felt from the beginning, and the earliest contrary thought was this: "The counsel for the appellee have furnished us with a string of cases in which the jurisdiction in question has been entertained by the Supreme Court of the United States. They have had it in their power to do this, because the cases occurred in *that* court, and not in this; because the man, and not the lion, was the painter (See *Æsop's Fables*):" ROANE, J., *Hunter v. Martin* (1814), 4 Munf. (Va.) 51.

After such sentiments, the clear and decisive language of Chief Justice TANEY, in *Abelman v. Booth* (1858), 21 How. (62 U. S.) 506, 522, ought to be carefully read and reflected upon, as the sentiment of one well nigh devoid of political principles inimical to State sovereignty; especially if MARSHALL and STORY should be thought too strong in their Nationalism.

Cohens v. Virginia (1821), 6 Wheat. (19 U. S.) 264, came next. It was "a writ of error to the judgment of the Court of Hustings for the borough of Norfolk, on an information for selling lottery tickets, contrary to an Act of the Legislature of Virginia." An Act of Congress, authorizing the lottery, was held invalid in Virginia, and an appeal to a higher State Court denied; this writ was then taken directly to the Supreme Court of the United States. On a motion made in the latter Court to dismiss the writ, three points were argued—

First. That the State was a defendant.

Second. That no writ of error to the State Court could be prosecuted.

Third. That neither the Constitution nor the laws of the United States had been violated. This point was finally sustained by the Court after a hearing on the merits, and does not fall within the scope of the present annotation.

MARSHALL, C. J., said—"The questions presented to the Court by the two first points made at the bar, are of great magnitude, and may truly be said vitally to affect the Union. They exclude the inquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the Government to apply a corrective. They maintain that the Nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the Government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the Nation; but that this power may be exercised, in the last resort, by the courts of every State of the Union. That the Constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision, without permitting inquiry, affirms that the decision he asks does not depend on inquiry:" *Id.* 377. And these are seen to be the sentiments of the Virginia Judges, page 629, *supra*.

Discussing, then, the first question, the Chief Justice proceeded—"A case in law or equity, consists of the right of

one party, as well as of the other, and may truly be said to arise under the Constitution, or a law of the United States, whenever its correct decision depends on the construction of either. * * With the ample powers confided to this Supreme Government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are, in themselves, limitations of the sovereignty of the States; but, in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power, to maintain the principles established in the Constitution. The maintenance of these principles in their purity, is certainly among the great duties of Government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the Constitution, or laws, of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. * * * We think a case arising under the Constitution, or laws, of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case:" *Id.* 379, 382-3.

It should be observed that this was twenty-four years after the adoption of the Eleventh Amendment, which was declared adopted January 8th, 1798.

The Chief Justice proceeded, substantially, to review the sentiments of the Virginia Judges, quoted above, and put them aside with these words—"But a Constitution is framed for ages to come, and is designed to approach im-

mortality, as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, so far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No Government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed, and it is reasonable to expect that a Government should repose on its own Courts, rather than on others. There is certainly nothing in the circumstances under which our Constitution was formed, nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave them, and their tribunals, the power of resisting, or defeating, in the form of law, the legitimate measures of the Union. The requisitions of Congress, under the Confederation, were as constitutionally obligatory as the laws enacted by the present Congress. That they were habitually disregarded, is a fact of universal notoriety. * * * The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make, or to unmake, resides only in the whole body of the people, not in any sub-division of them. The attempt of any of the parts to exercise it, is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it:" *Id.* 387-8, 389.

These last words are the foundation for the Force Bill of 1833, *infra*.

Coming closer to the Neagle case, the Chief Justice noticed the argument

that "cases between a State and one of its own citizens, do not come within the general scope of the Constitution:" *Id.* 390. And this was the answer to that argument—"If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into Court, that part of the second section of the Third Article, which extends the judicial power to all cases arising under the Constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction, where the character of the parties would not give it, that this very important part of the clause was inserted:" *Id.* 391.

Another definition of a case, which falls with the supervising powers of the Supreme Court, is given at the close of that portion of the opinion which treats of the power which is appellate, and not original, though a State is a party, as in a criminal case. "The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but 'to a case in law or equity,' in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a Court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend:" *Id.* 405.

Coming next to the question, whether the Eleventh Amendment prevents the examination of a conviction in the State Criminal Court, the amendment was first cited literally—

XI. "The judicial power of the United States shall not be construed to extend to any suit in law or equity,

commenced, or prosecuted, against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

Then, after a discussion of the nature of a suit and a writ of error, the conclusion reached was—"If this writ of error be a suit in the sense of the Eleventh Amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' It is not, then, within the amendment, but is governed entirely by the Constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the Constitution, or laws, of the United States, without respect to parties:" *Id.* 412. Just before, the Chief Justice had expressed his opinion that "If a suit, brought in one Court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced, or prosecuted, against a State. It is clearly, in its commencement, the suit of a State against an individual, which suit is transferred to this Court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a Constitutional defense against a claim, made by a State:" *Id.* 409.

The decision then passed to the affirmation of the judgment in *Martin v. Hunter's Lessee* (*supra*, page 628), and after reviewing the objections advanced by the Virginia judges, and also considering the nature of the Union, and citing, as contemporary exposition, *The Federalist*, and the Judiciary Act of 1789, the Chief Justice reached this conclusion—"Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist can ever influence a State or its courts, the necessity of uniformity, as well as correctness in expounding the Constitution and laws of

the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved. We are not restrained, then, by the political relations between the General and State Governments, from construing the words of the Constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import. * * * The American people may certainly give to a national tribunal a supervising power over those judgments of the State courts, which may conflict with the Constitution, law, or treaties of the United States, without converting them into Federal courts, or converting the National into a State tribunal. The one Court still derives its authority from the State, the other still derives its authority from the Nation. * * * 'A complete consolidation of the States, so far as respects the judicial power,' would authorize the Legislature to confer on the Federal courts appellate jurisdiction from the State courts, in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases, in the decision of which the Nation takes an interest, is too obvious not to be perceived by all. * * * The question, then, must depend on the words themselves; and on their construction, we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin v. Hunter*:" *Id.* 416, 422, 423.

This decision, in *Cohens v. Virginia*, was unanimous, the Court being composed of MARSHALL, C. J., and JOHNSON, LIVINGSTON, TODD, DUVALL, and STORY, J. J. WASHINGTON, J., was absent.

The power of the United States courts and judges to declare and enforce a final

determination of the meaning and application of the National laws, being thus settled, we may now pass to the question of the power to release officers and persons in the custody of the State authorities.

The general question of the right to issue writs of *habeas corpus* was discussed in such cases as *U. S. v. Hamilton* (1795), 3 Dall. (3 U. S.) 17; *Ex parte Bollman* (1807), 4 Cranch (8 U. S.) 75; *Ex parte Watkins* (1830), 3 Pet. (28 U. S.) 193; *Ex parte Milligan* (1866), 4 Wall. (71 U. S.) 2. But this annotation is necessarily confined to cases where the National powers have been exerted over persons detained by the States, and the general principles must be assumed, or merely alluded to in connection with the precise subject.

As the courts of the United States are of limited jurisdiction and also dependent upon Acts of Congress for the right to exercise the judicial powers conferred by the Constitution of the United States (*U. S. v. Hudson* (1812), 7 Cranch (11 U. S.) 32; *Ex parte Bollman*, *supra*; *Tennessee v. Davis*, *infra*), the statutes from the time of the celebrated Force Bill of 1833 will be cited in full, in their proper order of time. But, first, it will be well to examine one more case.

In *Osborn v. The Bank* (1824), 9 Wheat. (22 U. S.) 739, the jurisdiction of the United States Circuit Court, in suits by the Bank, was upheld, because given by a valid law of the United States, MARSHALL, C. J., saying: "The Constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate that in any such case, the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised

in the first instance, in the courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the Government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States. We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Courts original jurisdiction, in any case to which the appellate jurisdiction extends. We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title, or right, set up by the party, may be defeated by one construction of the Constitution, or law, of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the Constitution, but to those parts of cases only which present the particular question involving the construction of the Constitution, or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from author-

izing those courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the Constitution, laws, or treaties of the United States, a trial in the Federal courts will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will. We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact, or of law, may be involved in it:" *Id.* 821-3.

All the other Judges, except JOHNSON, J. (who dissented), agreed with the Chief Justice. They were WASHINGTON, TODD, DUVALL, STORY, and THOMPSON, J. J.

JOHNSON, J., in the course of dissenting opinion, said: "Efforts have been made to fix the precise sense of the Constitution, when it vests jurisdiction in the General Government, in 'cases arising under the laws of the United States.' To me the question appears susceptible of a very simple solution; that all depends upon the identity of the case supposed; according to which idea, a case may be such in its very existence, or it may become such in its progress. An action may 'live, move, and have its being,' in a law of the United States; such is that given for the violation of a patent right, * * * And of the other description [those], * * * in which the pleadings, or evidence, raised the question on the law, or Constitution, of the United States. In this class of cases, the occurrence of a question makes the case and transfers it, as provided for under the twenty-fifth sec-

tion of the Judiciary Act, to the jurisdiction of the United States. * * * As to cases of the first description, *ex necessitate rei*, the courts of the United States must be susceptible of original jurisdiction; and, as to all other cases, I should hold them, also, susceptible of original jurisdiction, if it were practicable, in the nature of things, to make out the definition of the case, so as to bring it under the Constitution, judicially, upon an original suit. But, until the plaintiff can control the defendant in his pleadings, I see no practical mode of determining when the case does occur, otherwise than by permitting the cause to advance until the case, for which the Constitution provides, shall actually arise:" *Id.* 887-9.

The Force Bill of March 2, 1833 (4 Stat. at L. 632), is entitled "An Act further to provide for the collection of duties on imports," and enacts, § 7—That either of the Justices of the Supreme Court, or a Judge of any District Court of the United States, in addition to the authority already conferred by law [§ 14 of the Judiciary Act, *supra*, page 624], shall have power to grant writs of *habeas corpus* in all cases of a prisoner, or prisoners, in jail, or confinement, when he, or they, shall be committed, or confined on, or by, any authority, or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof, anything in any Act of Congress to the contrary notwithstanding. And if any person, or persons, to whom such writ of *habeas corpus* may be directed, shall refuse to obey the same, or shall neglect, or refuse, to make return, or shall make a false return thereto, in addition to the remedies already given by law, he, or they, shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished

by fine not exceeding one thousand dollars, and by imprisonment not exceeding six months, or by either, according to the nature and aggravation of the case.

This section is incorporated into sections 753 and 643, of the Revised Statutes; no cases grew out of it at the time (see 1 Von Holst, Const. Hist. 459, sqq.), and it remained for use in protecting United States Marshals in fugitive slave cases, as mentioned below.

The importance of the peculiar wording of this section will be further apparent when there is considered the refusal of the Circuit Court for Pennsylvania and New Jersey, to release the Secretary of the Spanish Legation, by a writ of *habeas corpus*, from confinement by the State authorities, for forgery: *Ex parte Cabrera* (1805), 1 Wash. C. C. 232. WASHINGTON, J., said, while speaking of the Fourteenth Section of the Judiciary Act: "I am one of those, I confess, who have always thought it would have been better if the Legislature of the Union, in allotting to the several courts the jurisdiction they were to exercise, had occupied the whole ground marked out by the Constitution; but I am not one of those who think it a commendable quality in a Judge to enlarge, by construction, the sphere of his jurisdiction: that of the Federal Courts is of a limited nature, and cannot be extended beyond the grant:" *Id.* 237. And the Secretary was left to the mercies of the State and his action or criminal remedy, as he might be advised.

The Act of August 29, 1842 (5 Stat. at L. 539), came next, and, though not closely connected with the Neagle case, is worthy of note, for its distinct advance at so late a day. Its immediate cause, however, was the Treaty of 1842 with Great Britain.

It is entitled "An Act to provide further remedial justice in the courts of the United States;" and enacts—"That

either of the Justices of the Supreme Court of the United States, or Judge of any District Court of the United States, in which a prisoner is confined, in addition to the authority already conferred by law [§ 14 of the Judiciary Act], shall have power to grant writs of *habeas corpus* in all cases of any prisoner, or prisoners, in jail or confinement, where he, she, or they, being subjects or citizens of a foreign State, and domiciled therein, shall be committed, or confined, or in custody, under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done, or omitted, under any alleged right, title, authority, privilege, protection, or exemption, set up, or claimed, under the commission, or order, or sanction, of any foreign State, or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. And upon the return of the said writ, and due proof of the service of notice of the said proceeding, to the Attorney-General, or other officer, prosecuting the pleas of the State, under whose authority the prisoner has been arrested, committed, or is held in custody, to be prescribed by the said Justice, or Judge, at the time of granting said writ, the said Justice, or Judge, shall proceed to hear the said cause; and if, upon hearing the same, it shall appear that the prisoner, or prisoners, is, or are, entitled to be discharged from such confinement, commitment, custody, or arrest, for, or by reason of, such alleged right, title, authority, privilege, protection, or exemption, so set up and claimed, and the laws of nations applicable thereto, and that the same exists in fact, and has been duly proved to the said Justice, or Judge, then it shall be the duty of the said Justice, or Judge, forthwith to discharge such prisoner, or prisoners, accordingly. And if it shall appear to the said Justice, or Judge, that such

judgment, or discharge, ought not to be rendered, then the said prisoner, or prisoners, shall be forthwith remanded: *Provided always*, that from any decision of such Justice, or Judge, an appeal may be taken to the Circuit Court of the United States, for the District in which the said cause is heard; and from the judgment of the said Circuit Court, to the Supreme Court of the United States, on such terms, and under such regulations and orders, as well as for the custody and appearance of the prisoner, or prisoners, as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus* returned thereto, and other proceedings, as the Judge hearing the said cause may prescribe; and pending such proceedings, or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against the said prisoner, or prisoners, in any State Court, or by, or under the authority of any State, for any matter, or thing, so heard and determined, or in process of being heard and determined, under and by virtue of such writ of *habeas corpus*, shall be deemed null and void.

This statute is incorporated in, sections 751, 752, 753, 762, 763, 764, 765 and 766 of the Revised Statutes of the United States.

Ex parte Dorr (1845), 3 How. (44 U.S.) 104, was a motion by the counsel for Dorr, for a writ of *habeas corpus*. McLEAN, J., stated the case thus: "Thomas W. Dorr was convicted, before the Supreme Court of Rhode Island, at March Term, 1844, of treason against the State of Rhode Island, and sentenced to the State prison for life. And it appears from the affidavits of Francis C. Treadwell, a counsellor-at-law of this Court, and others, that access to Dorr in his confinement, to ascertain whether he desires a writ of error, to remove the record of his conviction to this Court,

has been refused. On this ground the above application has been made. Have the Court power to issue a writ of *habeas corpus* in this case? * * In the trial of Dorr it was insisted that the law of the State, under which he was prosecuted, was repugnant to the Constitution of the United States. And on this ground a writ of error is desired, under the twenty-fifth section of the Judiciary Act above named. That, as the prayer of this writ can only be made by Dorr, or by some one under his authority, and as access to him in prison is denied, it is insisted that the writ to bring him before the Court is the only means through which this Court can exercise jurisdiction in his case by a writ of error. Even if this were admitted, yet the question recurs whether this Court has power to issue the writ to bring him before it. That it has no such power under the common law is clear, and it is equally clear that the power nowhere exists, unless it be found in the fourteenth section above cited. [*Supra*, page 624.] * * The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section, is indisputable. [So held by MARSHALL, C. J., *Ex parte Bollman* (1807), 4 Cranch (8 U. S.) 75, 99.] Neither this, nor any other Court of the United States, or Judge thereof, can issue a *habeas corpus*, to bring up a prisoner, who is in custody, under a sentence, or execution, of a State Court, for any other purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual, who may be indicted in a Circuit Court for treason against the United States, is beyond the power of Federal Courts and Judges, if he be in custody under the authority of a State : " *Id.* 104, 105. The Court was unanimous, being composed of TANEY,

C. J., and STORY, MCLEAN, WAYNE, CATRON, MCKINLEY, DANIEL and NELSON, J.J.

TREAT, J. (*In re McDonald* (1861), 9 AMER. LAW REG. (O. S.) 661, 672), while sitting in the District Court for the District of Missouri, explains why *Dorr's* case was so decided: "That proviso [to the Fourteenth Section of the Judiciary Act] was for the express purpose of preventing conflicts between Federal and State authority—of confining the United States Courts and Judges within their appropriate spheres."

Ex parte Jenkins (1853), U. S. Circ. Ct., E. Dist. Pa., 2 Wall., Jr. 521 : s. c. 2 AMER. LAW REG. (O. S.), 144. The first case was a *habeas corpus* issued to bring up the bodies of certain United States Deputy Marshals who had been arrested under a charge of assault and battery, while seeking to arrest a fugitive slave in Luzerne County, Pennsylvania. (A full statement of the facts of this and the following cases, is given in 3 AMER. LAW REG. (O. S.), 208 sqq.) The State of Pennsylvania did not make any appearance or opposition on the return of the writ, and the Court refused to hear David Paul Brown, Esq., who nominally appeared for the constable, but in reality for certain abolitionist societies. Mr. Brown had been heard, as *Amicus Curia*, on the presentation of the petition for the writ, and pointed out that the *Habeas Corpus* section of the Judiciary Act of 1789 (§ 14) did not authorize the issuing of the writ in this case. GRIER, J., said: "But this writ was not allowed and issued under the general law, but, as the District Attorney of the United States has stated, under special powers conferred by the Act of Congress of 2d March, 1833. * * * * * This Act was passed when (Ch. 57, § 7) a certain State of this Union [South Carolina] had threatened to nullify Acts of Congress, and to treat those as criminals who should attempt

to execute them; and it was intended as a remedy against such State legislation. * * * The extreme advocate of State rights would scarcely contend that, in such cases, the Courts of the United States should be wholly unable to protect themselves or their officers:" *Id.* 527, 529. A discharge was ordered.

Ex parte Jenkins (vide supra): The second case was a *habeas corpus* to bring up the bodies of the same Deputy Marshals, who had been arrested on a *capias* for the same assault, at the suit of the fugitive slave, and committed for want of bail. KANE, J., said: "He who has read the Act of Congress of March 2d, 1833, or who remembers the times, to meet which it was passed, knows perfectly well that it looked to the contingency of a collision between the general and the State authorities. There were statesmen then who imagined it possible that a statute of the United States might be so obnoxious in a particular region, or to a particular State, as that the local functionaries would refuse to obey it, and would interfere with the officers who were charged to give it force, even by arresting and imprisoning them. In direct antecedence, therefore, to the section under consideration, they framed two other [temporary] sections of the same statute, one authorizing the military forces of the United States to be employed in aid of the judicial power; the other authorizing a resort to special jails for the safe-keeping of United States prisoners. It was necessary to go one step further. The military power might enforce the execution of the laws, when the Marshal had failed and been made a prisoner himself for attempting to execute them; the prisons specially constituted might detain those whom the military had arrested; but the officer of the law, arrested in the discharge of his duty, imprisoned for the offence of attempting to discharge it, perhaps at

the suit of the resisting State, more probably at the instance of some private grief, what was to become of him? This seventh section meets the case and gives the remedy:" *Id.* 535. A discharge was ordered. (S. C. 3 AMER. LAW REGISTER (O. S.), 227.)

Ex parte Jenkins (vide supra): The third case was a *habeas corpus* to bring up the bodies of the same Deputy Marshals, who had been arrested under a bench warrant from the Court of Quarter Sessions of Luzerne County, based on an indictment charging them with riot, assault and battery, and assault with attempt to kill. The circumstances of all three cases were the same. KANE, J., again discharged the Marshals, saying: " * * * The rule which has been referred to, as obtaining so generally in the cases of concurrent jurisdiction, that the Court which first asserts jurisdiction, shall retain it to the end, does not apply. That is a rule of comity, founded on the general convenience, seeking to avert a conflict of action between two sets of courts. It assumes that the jurisdictions are concurrent, and the controversies the same. But in cases like that before me, either the subjects of controversy in the two courts are not the same, but the proceedings involve differing questions of law or fact; or invoke different modes of relief or censure; or else, all these being the same in the two courts, it was the object and purpose of the Act of Congress to make the jurisdiction of the Federal Court revisory, and its action controlling, for the very reason that, otherwise, such a conflict might exist between the two. On the first of these suppositions, there has been no prior assertion of jurisdiction by the tribunal of the State; on the other, the relation of the Federal to the State Courts is adversary rather than concurrent. In a word, then, as I read the section, it is my duty to hear and determine, not-

withstanding the proceedings that have been had before a State Court, just so far as may bear upon the question of the relator's right to a discharge under the laws of the United States. But no further:" *Id.* 542.

U. S. ex rel v. Morris (1854), 2 AM. LAW REG. (O. S.) 348, in the District Court for Wisconsin, was very similar to the preceding cases, and the Deputy Marshal was discharged.

Thomas v. Crossin (1854), 3 AM. LAW REG. (O. S.) 207, is the hearing, in the Supreme Court of Pennsylvania, of a motion for an attachment against the Sheriff for failure to bring in the bodies of the Deputy Marshals, discharged by the United States Court, as mentioned above, page 638. After reviewing the nullification proceedings of South Carolina, the seventh section of the Force Bill was construed only to relate to acts done in pursuance of "an *avowed purpose*, by some authority or law of a State, to disregard an act of Congress, and to imprison, or otherwise punish, the officers of the United States, and their assistants, for enforcing it, and operates only in cases where this purpose *appears on the face of the proceedings*:" *Id.* 216. The italics are those of Judge Lewis, and some additional extracts from his opinion are necessary for the understanding of such a narrow construction of this perpetual section of the Force Bill. The learned Judge alluded to the provisions of the Act of 1842 (*supra*) and then said: "But no such provisions are contained in the Act of 1833. No authority is given to 'hear the cause,' nor to receive proofs, apart from the cause of detainer returned. The difference between the two acts, and the diversity in the several occasions which produced them, plainly show that Congress intended that the powers granted by, and the mode of action under them, should also be different. In the one case, the Judges were confined to the cause of

detainer returned, for the reason that this was all that was required to accomplish the object of the act. In the other, they were authorized to go behind the return, and to inquire into the facts and merits of the justification relied on; for nothing short of this would effectuate the manifest intention of the law, or meet the mischief designed to be remedied:" *Id.* 217-8.

Without anticipating too much, the language of TREAT, J. (*In re McDonald* (1861), 9 AMER. LAW REG. (O. S.) 662), while sitting in the District Court for Missouri, may be quoted: "Suffice it to say, that in each instance when the Federal Courts have been compelled to act under the law of 1833, so far as is known, they have not failed to exercise and enforce their authority, in cases similar to those just mentioned. Judge MCLEAN and Judge GRIER, of the Supreme Court, have given elaborate, convincing and sound decisions upon that subject; the correctness of which, Judges LEAVITT, KANE and MILLER, of the District Courts, have not hesitated to put into practical application, despite local excitement, prejudices and resistance:" *Id.* 684.

Ex parte Robinson (1855), 6 McLean 355, was a petition for a *Habeas Corpus*, by the United States Marshal for the District of Ohio, stating his imprisonment by a State Judge for the performance of his duty in connection with the Fugitive Slave Law. MCLEAN (Associate Justice of the Supreme Court of the United States) released the Marshal, of course, and as the State Judge had relied upon the reasoning of the Wisconsin cases (3 Wis. 1 and 157), decided in 1854 and reversed by the United States Supreme Court in 1858: (*infra* p. 640) the learned Judge went on to say:—"It is a general principle of law, to which I know of no exception, that the laws of every Government shall be construed by itself; and such

construction is acted upon by the judiciary of all other countries. By the Federal Constitution [Art. III. Sec. 1] the judicial power of the United States is declared to be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Under this provision, the judiciary of the Union gives a construction to the laws, which is obligatory on the State tribunals * * * State rights are invoked by the counsel. If these rights are construed to mean a subversion of the Federal authorities, they may be somewhat in danger. * * A sense of duty compels me to say, that the proceedings of the honorable Judge were not only without the authority of law, but against law, and that the proceedings are void, and I am bound to treat them as a nullity." *Id.* 362, 364-5.

Ex parte Robinson (1856), 1 Bond 39, was a similar petition by the same Marshal of the same District, who had been imprisoned by a State Court for contempt, in not producing the fugitive slaves. The Marshal claimed the protection of the Act of 1833, and LEAVITT, U. S. Dist. J., said: "It is insisted by the counsel who oppose the discharge of the Marshal, that this provision of the Act of Congress applies only to the case of a Federal officer who is confined, or imprisoned, by State authority, under an unconstitutional State law, and reference is made to the historical fact that the Act of 1833 was passed to meet the then existing exigency, growing out of the threatened opposition of one of the States of the Union to the national legislation for the imposition and collection of duties on imports. To this it may be replied that whatever may have been the peculiar circumstances under which the Act passed, the section above quoted is still in full force, and obligatory as a law of the United States. And it may be fairly inferred that while its purpose

was, at the date of its passage, to provide against a great danger then pending, it has been deemed expedient that it should be continued, as a remedy against nullification in any form in which it might be presented:" *Id.* 43. The Marshal was discharged, with a reiterated disclaimer of jurisdiction to review or reverse the action of the State Judge, the jurisdiction exercised being solely under this statutory provision: *Id.* 49, 50.

Abelman v. Booth (1858), 21 How. (62 U. S.) 506, arose under the Fugitive Slave Law of 1850, Abelman having arrested Booth, under a proper warrant, for aiding and abetting the escape of a fugitive slave. Booth sued out a *habeas corpus* from the State Court, and in the language of TANEY, C. J. (writing a year after his *Dred Scott* decision), "a judge of the Supreme Court of the State of Wisconsin, in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner, for an offense against the laws of this Government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the Supreme Court of the State. And it further appears, that the State court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this Court pursuant to the Act of Congress of 1789, to bring here for examination and revision, the judgment of the State court. These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State courts over the courts of the United States, in cases arising under the

Constitution and laws of the United States, is now, for the first time, asserted and acted upon in the Supreme Court of a State:" *Id.* 513, 514. This last remark is manifestly incorrect. See *Martin v. Hunter, supra*, a case not cited in this opinion, nor in the brief of Attorney General Jeremiah S. Black.

The issue thus tendered to the United States Supreme Court was met as decidedly by TANEY, as earlier by MARSHALL, for he pointed out that "The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for, if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty, which the States then possessed, should be ceded to the General Government; and that, in the sphere of action assigned it, it should be supreme and strong enough to execute its own laws, by its own tribunals, without interruption from a State, or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution, peacefully, by its judicial tribunals." *Id.* 517.

Apparently, with attention towards the difficulty which arose in *Martin v. Hunter, supra*, Chief Justice TANEY

continued: "The appellate power, it will be observed, is conferred on this Court in all cases or suits in which such a question shall arise. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of a State, or of the United States. And it is manifest that this ultimate appellate power, in a tribunal created by the Constitution itself, was deemed essential to secure the independence and supremacy of the General Government, in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform and the same in every State; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a state and of the United States, if there was no common arbiter, authorized to decide between them. * * * And, as the courts of a State, and the courts of the United States might, and indeed, certainly would often differ as to the extent of the powers conferred by the General Government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them, finally and without appeal. * * * Now, it certainly can be no humiliation to the citizen of the Republic, to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State, to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And cer-

tainly no faith could be more deliberately and solemnly pledged, than that which every State has plighted to the other States, to support the Constitution as it is, in all its provisions, until they shall be altered in the manner in which the Constitution itself prescribes. In the emphatic language of the pledge required, it is to support this Constitution. And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this Court, to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose, to bring here for revision, by writ of error, the judgment of a State court, where such questions have arisen, and the right claimed under them, denied by the highest judicial tribunal in the State." *Id.* 518, 519, 525.

When the Remittitur from the United States Supreme Court reached the Supreme Court of Wisconsin, DIXON, C. J., delivered an extended opinion (*Ableman v. Booth* [1859], 11 Wis. 517), assenting to the doctrine of Chief Justice TANEY, and citing 1 Calhoun's Works, 321, 328, 259; *Martin v. Hunter*, and *Cohens v. Virginia*, *supra*; 1 Kent's Com. 349; *Piqua Bank v. Knapp* (1856), 6 Ohio St. 342; and in a note, among others, *Ferris v. Coover* (1858), 11 Cal. 175, in which TERRY, C. J. (the dead man in the principal case), denied the constitutionality of the Judiciary Act and the claim of jurisdiction under it, as above mentioned, saying that "it has never been admitted in Virginia, has always been repudiated by Georgia, and has lately been questioned in several other States. The decisions of the United States Supreme Court on this question embody the political principles of a party which has passed away. The reasoning by which it is attempted to sustain them, is based upon rules of construction now universally regarded as unwarranted by the letter, or spirit, of

the Constitution, and directly opposed to those adopted by the same tribunal in the late case of *Dred Scott v. Sandford* (1856), 19 How. (60 U. S.) 393, and in the more recent case [of *People's Ferry Co. v. Beers* (1857)] in 20 How. (61 U. S.) 393, in which the admiralty jurisdiction of State Courts is admitted, notwithstanding the Ninth Section of the Judiciary Act. The force and authority of the opinions of the Supreme Court of the United States, upon the question of jurisdiction, as well as all others of a political nature, is much weakened by the consideration that the political sentiments of the Judges in such cases necessarily gave direction to the decisions of the Court. The Legislative and Executive power of the Government had passed, or was rapidly passing, into the hands of men entertaining opposite principles. Regarding the Judicial as the conservative department, believing the possession by the General Government of greater powers than those expressly granted by the Constitution to be absolutely necessary to its stability, they sought, by a latitudinarian construction of its provisions, to remedy the defects in that instrument, and by a course of judicial decisions, to give direction to the future policy of the Union. In order to accomplish this end, the Court almost invariably upheld every assumption of power by the General Government (however at variance with the limitations of the Constitution), including the alien and sedition law, the embargo act, the charter of the United States Bank, and a retrospective bankrupt law; the constitutionality of which acts is supported by the same course of reasoning, and the same *liberal* construction of the *implied* powers of Congress, as is applied to the Judiciary Act of 1789. All the arguments adduced in favor of the claim of jurisdiction on the part of the Federal Court, are answered, and the unconstitutionality of

the Twenty-fifth Section of the Judiciary Act, to my mind, conclusively established, by the able opinions in *Hunter v. Martin*, 4 Mun. (*supra*); *Padelford v. Mayor and Aldermen of Savannah* (1853), 14 Ga. 438; *Johnson v. Gordon* (1854), 4 Cal. 368; and the very elaborate [dissenting] opinion of Mr. Chief Justice BARTLEY, in the case of the *Piqua Bank v. The Treasurer of Miami County* (1856), 6 Ohio St. 342, in which all the authorities are collected:” *Id.* 183-4. [But, *contra*, pages 644 and 645.]

This was not very gracious, as the same Judge had been released from the custody of the San Francisco Vigilance Committee to allow him to try a case in his own Court, by virtue of a *habeas corpus* issued out of the United States Circuit Court, under the Fourteenth Section of the Judiciary Act: *Ex parte Des Rochers* (1856), 1 McAllister 68.

The Booth cases were considered as of ruling authority for the point, that a State Court had no jurisdiction to issue a writ of *habeas corpus* when the party was imprisoned by the draft commissioner, a ministerial officer, for disobedience in not reporting after being drafted: *In re Spangler* (1863), 11 Mich. 298; S. C. 2 AMER. LAW REG. (N. S.) 598. But DILLON, J., endeavored to exclude imprisonment by a ministerial officer: *Ex parte Anderson* (1864), 16 Iowa 595, though “there is no solid distinction between the two classes” of imprisonment by ministerial officers and under the judgment of a judicial tribunal: PAINE, J., *In re Tarble* (1870), 25 Wisc. 396. And such is the opinion of the Supreme Court of the United States, *infra*, page 644.

When a similar question came again before the Supreme Court of Wisconsin, PAINE, J. (who had been counsel for Booth, see 11 Wis. 499), defended the original judgment of that Court in

this wise—“When this Court, in the *Booth case*, assumed the power, in the exercise of its ordinary jurisdiction, to issue the writ of *habeas corpus*, to pass collaterally upon the jurisdiction of the District Court of the United States, to pronounce the judgment under which Booth was imprisoned, it was not assuming any such unwarrantable or unheard of power, as it has been charged with doing; and that, on the contrary, whatever might be said as to the correctness of its decision, still, in exercising the right to decide the question, it was proceeding upon a principle universally recognized, and exercising a right that is, and must, of necessity, be exercised by all courts. For there is no just reasoning upon which any distinction can be asserted between a *habeas corpus* and any other judicial proceeding, or suit, in respect to the right of the Court to decide upon the validity of the judgment of any other court that may be drawn in question. * * * A judgment in a civil suit disposes of the title to property. A judgment in a criminal suit disposes of the prisoner’s right to liberty. A civil suit, involving the title to that property, is the appropriate proceeding in which the jurisdiction of the Court to render the one judgment may be drawn into question collaterally. A proceeding by *habeas corpus*, may appropriately have the same effect as to the other:” *In re Tarble* (1870), 25 Wis. 399, 401.

This defence is manifestly available, if needed, for the United States Courts, when the circumstances are reversed.

The real defence of the Wisconsin Court was expressed, later in their opinion in the same *Tarble case*, thus—“That which was really unusual and extraordinary was, not that it [the Wisconsin Court, in the *Booth case*], assumed the power to decide upon the question, but that, in exercising that power, it decided against the validity of

a law passed to sustain the institution of slavery. The public and judicial mind of the country was then in such a peculiar state upon that question, that it was doubtless this fact, together with the subsequent denial, by this Court, of the appellate jurisdiction, which was, in truth, contrary to the entire current of authority, that so shocked the nerves of the venerable members of the Supreme Court, that they failed to perceive distinctly the real theory upon which this Court had assumed the right to pass collaterally upon the validity of a judgment even of a Federal Court: PAINE, J., 25 Wis. 407.

U. S. v. Tarble (1871), 13 Wall. (80 U. S.) 397, was a writ of error to the Supreme Court of Wisconsin, who had discharged a deserter from the regular army from the custody of the United States military authorities, on the ground that he was a minor. The judgment of the State Court was reversed in an opinion by FIELD, J., on the ground that the State Court had no right to issue the writ. NELSON, GRIER, CLIFFORD, SWAYNE, MILLER, DAVIS, BRADLEY and STRONG, J. J., concurred. CHASE, C. J., dissented.

The *Booth* case (*supra*, p. 640,) was followed, and the decision therein was said to dispose "alike of the claim of jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal:" *Id.* 403-4.

Continuing, FIELD, J., said: "It is in the consideration of this distinct and independent character of the Government of the United States, from that of the government of the several States, that the solution of the question presented in this case, and in similar cases, must be found. There are, within the territorial limits of each State, two governments, restricted in their spheres of

action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers, with the action of the other. The two governments, in each State, stand in their respective spheres of action, in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States, when any conflict arises between the two governments. * * * * Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National Government must have supremacy, until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy, until judicial decision by the National tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. * * * Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this Court [in the *Booth* cases] to cases where a prisoner is held in custody, under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. * * * * All that is meant by the language used, is, that the State judge, or State court, should proceed no further, when it appears, from the application of the party, or the return

made, that the prisoner is held by an officer of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held, be illegally imprisoned, it is for the courts, or judicial officers of the United States, and those courts or officers alone, to grant him release:" *Id.* 406, 407, 410, 411.

The Wisconsin Court had said—"If there were no appellate jurisdiction, the argument of convenience, in favor of the position that all questions as to the legality of imprisonment, under alleged Federal authority, should be decided exclusively by Federal tribunals, would be very strong. It would then have been held that the judicial power of the United States, over all cases 'arising under the Constitution and laws,' was exclusive. But that appellate jurisdiction over the State Courts, exists. It was provided for by an Act of Congress, at the very outset of the Government. It has been steadily asserted, and exercised, by the Federal Court; and, though denied in a few instances [*vide, supra*, pages 627, 629 and 643], by the State Courts, may now be said to be universally acquiesced in:" PAINE, J., 25 Wis. 403. COLE, J., concurred, but DIXON, C. J., dissented on the ground afterwards taken by the Supreme Court of the United States, *supra*, that, in cases of this nature, the jurisdiction of the United States Courts is exclusive.

In all such cases in the State Courts, the jurisdiction of the inferior courts of the United States is not apparently regarded as affording much safety to the liberty of transgressors of the laws of the United States. For, curiously enough, the cases where the State courts attempted to exercise jurisdiction do not seem to be founded upon any inconvenience in applying to the United States Courts. In fact, "from the beginning

of the Government, down to the decision of the Supreme Court of the United States in 1858, in the [fugitive slave] cases of *Ableman v. Booth* and *U. S. v. Booth* (*supra*, page 640), I suppose the very decided preponderance of authority in the State Courts sustains the jurisdiction of those courts, to discharge upon *habeas corpus*, prisoners who, in their judgment, are illegally held, though held under the authority of the United States. * * * * Since that decision the weight of authority, even in the State Courts, is against the jurisdiction. * * * * The current of opinions in the courts of the United States is, so far as I know, absolutely unbroken, except by a single opinion, recently rendered by the learned District Judge for the Northern District of New York, in the matter of William Reynolds, on *habeas corpus*." BALLARD, J., *In re Farrand* (1867), 1 Abbott 140, 144.

Returning now to the course of decision after *Abelman v. Booth*, nothing appears until after the extinction of slavery.

The Act of February 5th, 1867 (14 Stat. at L. 385), is "An Act to amend" the Judiciary Act, and provides—"That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty, in violation of the Constitution, or of any treaty, or law, of the United States; and it shall be lawful for such person so restrained of his, or her, liberty, to apply to either of said justices, or judges, for a writ of *habeas corpus*, which application shall be in writing, and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he, or she, is detained, and by virtue of what

claim, or authority, if known; and the said justice, or judge, to whom such application shall be made, shall forthwith award a writ of *habeas corpus*, unless it shall appear from the petition itself, that the party is not deprived of his, or her, liberty, in contravention of the Constitution, or laws, of the United States. * * *

This statute is incorporated in sections 751, 752, 753, 763 and 765, and the appropriate portions are literally reenacted in sections 754, 755, 756, 757, 758, 759, 760, 761 and 766. (*Vide, supra*, page 597.)

Ex parte McCordle (1867), 6 Wall. (73 U. S.) 318, was a case where a *habeas corpus* had been issued by the United States Circuit Court for the District of Mississippi, to bring in the body of McCordle, who had been arrested by the military authorities of the United States, under the Reconstruction Acts of Congress. The prisoner was remanded, and from the order remanding him to the military authorities, he appealed to the Supreme Court of the United States, and in this form the case was heard on a motion to dismiss for want of jurisdiction; but the Court sustained the jurisdiction. The citation from the opinion of CHASE, C. J. (*supra* p. 592), was made in connection with the construction of the statutory right of appeal given originally "in a small class of cases, arising from commitments for acts done or omitted under alleged authority of foreign governments, by the Act of August 29, 1842 (5 Stat. at L. 539), which authorized a direct appeal from any judgment, upon *habeas corpus*, of a justice of this court, or judge of a district court, to the Circuit Court of the proper District, and from the judgment of the Circuit Court to this Court. This provision for appeal was transferred, with some modification, from the Act of 1842 to the Act of 1867; and the first question we are to consider, upon the

construction of that Act, is whether this right of appeal extends to all cases of *habeas corpus*, or only to a particular class:" *Id.* 325. And the Court held the Act to extend to all appeals.

"Subsequently the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was thus held, and before conference in regard to the decision proper to be made, an Act was passed by Congress (Act, March 27, 1868, 15 Stat. at L. 44), returned, with objections by the President, and re-passed by the constitutional majority, which it is insisted, takes from this Court jurisdiction of the appeal:" CHASE, C. J. *Ex parte McCordle* (1868), 7 Wall. (74 U. S.) 506. The Court held that "the Act of 1868 does not except from that jurisdiction any cases but appeals from circuit courts under the Act of 1867. It does not affect the jurisdiction which was previously exercised:" *Id.* 515, citing the previous decision in this case, 6 Wall. (73 U. S.) 324. This repealing Act was omitted from the Revised Statutes, § 764. To the same effect: *Ex parte Yerger* (1869), 8 Wall. (75 U. S.) 85.

U. S. ex rel. Roberts v. The Jailer, (1867) 2 Abbott 265, was a hearing upon *habeas corpus* of a special bailiff of a marshal, who had been fired upon by a person whom he sought to arrest and had returned the fire with fatal effect. The State officials arrested and indicted the bailiff and the United States Circuit Court [for Kentucky, where the death occurred] granted a discharge under the Seventh Section of the Force Bill. The Commonwealth's attorney for the county where the shooting occurred, was notified and argued against the discharge; to which the Court answered, on the general subject of jurisdiction,—“By a long course of judicial decisions, it may now be considered as settled that this act gives relief to one in State custody, not only

when he is held under a law of the State which seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the State which applies to all persons equally, where it appears he is *justified* for the act done, because it was done in pursuance of a law of the United States, or of a process of a Court or Judge of the same. * * * The decisions in the courts of the United States are absolutely uniform on this subject, and I find no opposing opinions of any court, except a single one rendered by the Supreme Court of Pennsylvania (*Thomas v. Crossin*, *supra*, page 639). But surely it cannot be expected that I should attach much importance to, much less follow, a single decision of a State Court, opposed as it is to numerous decisions of the Courts of the United States, some of them rendered by Justices of the Supreme Court. * * * I disclaim all right and power to discharge the relator on any such ground as that the proof shows he acted in *self-defence*. * * * I have only to inquire whether what he did, was done in pursuance of a law and process of the United States, and so *justified, not excused*, by that law and process. * * * I can discharge only the officer who relies on the law and process of the United States; as his sole authority and complete justification:" *Id.* 277.

But the same Judge, in *U. S. ex rel. Weedon* (1877), 2 Flip. 76, said: "In writing the opinion, in the case of *Roberts*, *supra*, I was inclined to think that a Federal officer was not entitled to claim his discharge, by simply showing that he had done nothing, except what he was justified in doing by process, but that he was obliged to show that he was justified by his process in doing the very thing imputed to him, and for which he was in confinement. I am constrained,

in deference to authority, to modify what that opinion indicates would be my action, when it appears that the officer is actually innocent of the crime imputed, and was faithful in doing all that he really did: *Ex parte Jenkins*, 2 Wall. 537 (*supra*)."

At this point, the case of *U. S. v. Doss et al.* (1872), 11 AMER. LAW REG. (N. S.) 320, came to trial in the District Court for the Western District of Missouri. Samuel Snow, a defendant, had been arrested under a warrant issued by a Commissioner of the United States, upon a charge of having in his possession, with the intention of passing as genuine, certain counterfeit obligations of the United States. He was lailed, but afterwards surrendered and committed to jail. McAfee, another defendant, then, as Probate Judge of the county, issued a writ of *habeas corpus*, upon a petition suppressing the facts, which, however, were made known to the State Judge by the return made by the United States Marshal. Snow was discharged by McAfee, and they, with Snow's attorney and another person, were indicted, under the Act of Congress (Rev. Stat., §§ 5398, 5401, for knowingly and wilfully obstructing the United States Marshal, and for rescuing Snow. The jury found the Judge and the attorney guilty, and acquitted the other defendants. There was no such violence as marked the case of *Ex parte Sifford* (1857), 5 AMER. LAW REG. (O. S.) 659, because that was a fugitive slave case, but the latter case will serve to indicate the necessity of such convictions, if the process of the United States Courts is to be executed.

Ex parte Bridges (1875), 2 Woods 428, was a hearing on *habeas corpus* of Bridges, who had been convicted, in the Superior Court of Randolph County, Georgia, of perjury before an United States Commissioner. BRADLEY (Associate Justice of the Supreme Court) re-

leased the relator, saying that "although it may appear unseemly that a prisoner, after conviction in a State Court, should be set at liberty by a single Judge on *habeas corpus*, there seems to be no escape from the law. If it were a case in which the State Courts had jurisdiction of the offense, the general rule of the common law would intervene, and require that the prisoner should be remanded, and left to his writ of error. In such a case, although the judgment were erroneous, the imprisonment would not be in violation of the Constitution, or laws, of the United States. The judgment might be wrong, but the imprisonment under it would be right, until the judgment was reversed:" *Id.* 432. (The relator was discharged, but immediately rearrested upon a bench warrant from the United States Court in Savannah.)

The learned Judge in the last case called attention to the Act of 1842 (*supra*, page 635), as extending the provisions of the Force Bill to foreigners, for the prevention of the complications growing out of the Canada rebellion and the action of the State of New York.

Ex parte Siebold (1879), 100 U. S. 371, was a case where certain Judges of Election had been convicted in the United States Circuit Court for the District of Maryland, under Sections 5515 and 5522, Rev. Stat. U. S. They presented petitions for *habeas corpus*, and the jurisdiction of the United States Supreme Court was sustained, as appellate and not original, though no writ of error could be brought. The discharge was asked for on the ground of the unconstitutionality of these sections, but the Court thought otherwise and refused the discharge.

The argument of the Virginia Court of Appeals, in 1814 (*supra*, p. 629,) was thus answered by BRADLEY, J., though it does not appear that the case was even mentioned: "The more general

reason assigned; to-wit, that the nature of sovereignty is such as to preclude the joint co-operation of sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the National and State governments, in the election of Representatives. It is, at most, an agreement *ab inconvenienti*. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the Constitution, relating to the regulation of such elections, contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State. If the two governments had entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then, the adoption by the State government, of a system of regulations, might exclude the action of Congress. By first taking jurisdiction of the subject, the State would require exclusive jurisdiction in virtue of a well-known principle, applicable to courts having co-ordinate jurisdiction over the same matter. But no such equality exists in the present case. The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent, which it deems expedient; and, so far as it is exercised, and no further, the regulations effected supersede those of the State, which are inconsistent therewith:" *Id.* 391, 392. The quotations on pages 593 and 599, *supra*, follow at a little interval. Then the same learned Judge proceeds: "This concurrent jurisdiction, which the National Government necessarily possesses, to exercise its powers of sovereignty in all parts of the United States, is distinct from that exclusive power, which, by the first article of the Constitution, it is authorized to exercise over

the District of Columbia, and over those places within a State, which are purchased by consent of the Legislature thereof, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. There, its jurisdiction is absolutely exclusive of that of the State, unless, as is sometimes stipulated, power is given to the latter, to serve the ordinary process of its courts in the precinct acquired. Without the concurrent sovereignty referred to, the National Government would be nothing but an advisory government. Its executive power would be absolutely nullified:" *Id.* 395. And then follow the quotations on pages 606 and 600, *supra*. And the opinion closes with these words: "The doctrine laid down at the close of counsels' brief, that the State and National Governments are co-ordinate and altogether equal, on which their whole argument, indeed, is based, is only partially true. The true doctrine, as we conceive, is this, that whilst the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and Constitutional laws of the latter are, as we have already said, the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as in theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect, not more to the autonomy and existence of the States, than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land:" *Id.* 398, 399.

The Court was composed of WAITE, C. J., and CLIFFORD, SWAYNE, MILLER,

FIELD, STRONG, BRADLEY, HUNT, and HARLAN, J. J. FIELD, J., filed a dissenting opinion, in which CLIFFORD, J., concurred. But, in the course of that dissent, the learned Judge was careful to say: "It was the purpose of the framers of the Constitution to create a government which could enforce its own laws, through its own officers and tribunals, without reliance upon those of the States, and thus avoid the principal defect of the Government of the Confederation: and they fully accomplished their purpose:" *Id.* 413. And, with somewhat peculiar inaptness to the present tragic incident, the same learned Judge says: "It is true that, since the recent amendments of the Constitution, there has been legislation by Congress, asserting, as in the instance before us [of regulating Congressional Elections], a direct control over State officers which previously was never supposed to be compatible with the independent existence of the States in their reserved powers. * * * They give to the Federal Government the power to strip the States of the right to vindicate their authority in their own courts, against a violator of their laws, when the transgressor happens to be an officer of the United States, or alleges that he is denied, or cannot enforce, some right under their laws. * * * In my judgment, and I say it without intending any disrespect to my associates, no such advance has ever before been made toward the conversion of our Federal system into a consolidated and centralized government:" *Id.* 413, 414.

Tennessee v. Davis (1879), 100 U. S. 257, is probably the most interesting of all the citations in the principal case. Davis had been indicted in the State Court for murder, and, before trial, was permitted to remove the proceedings to the United States Circuit Court, on the ground that he had not committed murder at all, but that he had acted in self

defence, while in performance of his duty as United States Deputy Collector of Internal Revenue. This was in accordance with Section 643, Rev. Stat. U. S. The State made a mot on to remand, but was denied. The opinion was written by STRONG, J., and WAITE, C. J., and SWAYNE, MILLER, BRADLEY, HUNT and HARLAN, J. J., concurred. CLIFFORD and FIELD, J. J., dissented.

In delivering the opinion of the Court, STRONG, J., said: "We come, then, to the inquiry most discussed during the argument, whether Section 643 is a constitutional exercise of the power vested in Congress. Has the Constitution conferred upon Congress the power to authorize the removal from a State Court to a Federal Court, of an indictment against a revenue officer, for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question, or a claim to a Federal right, is raised in the case, and must be decided therein?" *Id.* 262. Then follows the quotation, *supra*, page 601. The answer was in the affirmative.

Commenting on the judicial power of the Nation, as declared by the Second Section of the Third Article of the Constitution, the same Judge said: "This provision embraces alike civil and criminal cases arising under the Constitution and laws: *Cohens v. Virginia* (1821), 6 Wheat. (19 U. S.) 395. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case, may not be exerted as fully over a criminal one. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit [*vide supra*, page 629]. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton [*Cohens v. Virginia: vide supra*, pages 630, 632, 633]:" *Id.* 264.

In effect, answering the sentiments early advanced (*supra*, pages 627, 629), the same Judge said: "If, whenever and wherever a case arises under the Constitution and laws, or treaties, of the United States, the National Government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is at least temporarily silenced, instead of being at all times supreme. * * In deed, the powers of the General Government and the lawfulness of authority exercised, or claimed under it, are quite as frequently in question in criminal cases in State Courts as they are in civil cases, in proportion to their number. * * * Before the adoption of the Constitution, each State had complete and exclusive authority to administer, by its courts, all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new Government created, and so far as thus vested, it was withdrawn from the sovereignty of the State. Now, the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted:" *Id.* 266, 267.

FIELD and CLIFFORD, J. J., dissented, the latter advancing the same objection raised in the principal case (*supra*, page 595)—"Neither the Constitution, nor the Acts of Congress, give a revenue officer, or any other officer of the United States, an immunity to commit murder in a State, or prohibit the State from executing its laws for the punishment of the offender. Unquestionable jurisdiction to try and punish offenders against the authority of the United States is conferred upon the Circuit and District Courts; but the Acts

of Congress give those Courts no jurisdiction whatever of offences committed against the authority of a State. Criminal homicide, committed in a State, is an offense against the authority of the State, unless it was committed in a place within the exclusive jurisdiction of the United States. * * * When correctly understood, it is clear that the second case [*Cohens v. Virginia*, *supra*, page 630], cannot have any tendency whatever to support the proposition that an indictment for wilful and felonious murder, with malice aforethought, pending in the State Court, and found by a Grand Jury of the State under a statute of the State, not involving any Federal question, may be removed from the State Court into the Circuit Court, for trial, merely because the prisoner, at the time he committed the homicide, was a Deputy Collector of internal revenue. Such a proposition, unsupported by any respectable judicial authority, is only calculated to excite amazement, as the case cited is a direct and conclusive authority the other way, showing to a demonstration, that the Federal Courts cannot exercise any jurisdiction whatever in a criminal case properly pending in a State Court, unless it involves some question arising under the first clause of the second section of the article describing the judicial power conferred by the Constitution: 2 Story, Const., §§ 1721, 1740; 1 Kent, Com. 12th ed., 299; Sergeant, Const. 59; Curtis, Com., § 9; Pomeroy, Const., 2nd ed., § 760:” *Id.* 281, 289.

After the death of Justice CLIFFORD, and when the Court was composed of WAITE, C. J., and MILLER, FIELD, BRADLEY, HARLAN, WOODS, MATTHEWS, GRAY and BLATCHFORD, J. J., the principle upon which the last case was decided was affirmed in an opinion by MATTHEWS, J.: *Davis v. South Carolina* (1882), 107 U. S. 597.

In the previous month of May, *Ram-*

sey v. The Jailer (1879), 2 Flip. 457, came before the United States District Court for Kentucky. A deputy United States Marshal had killed a citizen of Kentucky, while in the discharge of his duty, and the State authorities had arrested the Marshal. The United States District Court issued a *habeas corpus*, and, after hearing, discharged the Marshal. The State Court then issued a bench warrant and the United States Court again released the Marshal. Again the State Court took advantage of the Marshal being in that Court and ordered him into custody. Again the United States Court released the Marshal, and insisted that their decision should be respected, following the fugitive slave cases, *supra*, page 637. The learned judge (BALLARD, J.), stated—“ I think, although this question has not been very directly passed upon by the Supreme Court of the United States, it is plainly touched upon in the case of *Coleman v. Tennessee* (1878), 97 U. S. 509. There a party, a soldier of the United States, during the war, killed a citizen of Tennessee, and the charge was murder. The Judge of the United States Court issued his writ of *habeas corpus*, and discharged him. He was subsequently tried in the State Court, and among the defenses made, was the defense that he had been discharged by the United States Court; and there was another defense, that for anything done by him, during the war, he was not amenable to the State of Tennessee. Now, the case in the Supreme Court went off chiefly on the latter point, but they also stated, substantially, that the judgment of the United States Court, discharging the prisoner, was a defense:” *Id.* 453-4. The opinion of the United States Supreme Court was delivered by FIELD, J., (CLIFFORD, J., dissenting,) and upon this precise point, *Ex parte Yerger* (*supra*, page 646,) was cited as authority

Robb v. Connolly (1884), 111 U. S. 624, was a case where the agent of the State of Oregon had been adjudged in contempt by a California Court, upon being served with a *habeas corpus*, for not producing a fugitive whom he had arrested in California by virtue of a warrant of the Governor of California, issued on the requisition of the Governor of Oregon. The agent claimed to be acting under the authority of the United States, but the Supreme Court of the United States held that he was not an officer appointed by, and owing a duty to, the United States; and so the *Booth* and *Tarble* cases were distinguished. HARLAN, J., in delivering the opinion, called attention to the fact that the question had never before been determined in the Supreme Court of the United States, and added: "Underlying the entire argument in behalf of the plaintiff in error is the idea that the judicial tribunals of the States are excluded altogether from the consideration and determination of questions involving an authority, or a right, privilege, or immunity, derived from the Constitution and laws of the United States. But this view is not sustained by the statutes defining and regulating the jurisdiction of the Courts of the United States. * * * So that a State Court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law, or in equity, arising under the Constitution, or laws of the United States, or involving rights dependent upon such Constitution or laws. Upon the State Courts, equally with the Courts of the Union, rests the obligation to guard, enforce and protect every right, granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit, or proceeding, before them. * * * It is proper to say that we have not overlooked the recent

opinion of the learned Judge of the Circuit Court of the United States for the District of California [SAWYER, J.], in *In re Robb* (1884), 19 Fed. Repr. 26. But we have not been able to reach the conclusion announced by him:" [that the agent of the State of Oregon was *pro hoc vice*, an officer of the United State]: *Id.* 635, 637, 639.

Later, in *Ex parte Royal* (1885), 117 U. S. 241, the principle of this decision was said to be sound, as having been held upon full consideration; but, it was also said by the same learned Justice, "it is clear that if the local statute, under which Royal was indicted, be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity:" *Id.* 248. The case raised the question whether the United States Circuit Court had "jurisdiction, on *habeas corpus*, to discharge from custody one who is restrained of his liberty in violation of the National Constitution, but who, at the time, is held under State process for trial, on an indictment charging him with an offense against the laws of the State: (*Id.* 245), in selling coupons without a license. The jurisdiction was sustained upon the authority of *Ex parte Yarbrough* (1883), 110 U. S. 654; *Ableman v. Booth*; *Ex parte Siebold*; *Tarble's case*, and *Robb v. Connelly*, *supra*. "That the petitioner is held under the authority of a State, cannot affect the question of the power, or jurisdiction, of the Circuit Court, to inquire into the cause of the commitment, and to discharge him, if he be restrained of his liberty in violation of the Constitution. The grand jurors who found the indictment, the Court into which it was returned, and by whose officer he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty, from the discharge of which the

State could not release them, to respect and obey the supreme law of the land, anything in the Constitution and laws, of any State, to the contrary notwithstanding:" *Id.* 249. The time when the United States Courts should act, was held also to be in their discretion, so that forbearance towards the State Courts might be exercised, even if it put the accused to a writ of error from the highest Court of the State; and *Ex parte Bridges, supra*, page 647, was quoted with approval. In the same term, this same principle of forbearance was followed in *Ex parte Fonda* (1885), 117 U. S. 516, and was applied in *Ex parte Hanson* (1886), 28 Fed. Repr. 127.

The principles laid down in the preceding cases were made the basis for the decisions upon the jurisdiction of the United States Courts, in interpreting the United States laws: *N. O., etc., R. R. Co. v. Miss.* (1880), 102 U. S. 135; *U. S. v. Lee* (1882), 106 *Id.* 196; *Covell v. Heyman* (1883), 111 *Id.* 176; *Starin v. N. Y.* (1885), 115 *Id.* 248; *Ex parte Hanson* (1886), 28 Fed. Repr. 127; *In re Ah Jow* (1886), 29 *Id.* 181; *Findley v. Satterfield* (1877), 3 Woods (U. S. Circ. Ct. Rep.) 504, where there are some interesting historical remarks on the Force Bill and the Act of 1842; in removal cases upon criminal charges: *Ex parte Turner* (1879), *Id.* 603; *Georgia v. O'Grady* (1876), *Id.* 496; *State v. Port* (1880), 3 Fed. Repr. 117; *Georgia v. Bolton* (1882), 11 *Id.* 217; in cases arising from enlistment of minors in the Army of the United States: *In re Farrand* (1867), 1 Abb. (U. S.) 140; *In re Neill* (1871), 8 Blatchf. 156; in extradition cases: *In re Bull* (1877), 4 Dillon 323; *In re Wildenhuis* (1886),

28 Fed. Repr. 924 (affirmed the same year, 120 U. S. 11); *U. S. v. Rauscher* (1886), 119 U. S. 407; *In re Reinitz* (1889), 39 Fed. Repr. 204; in election cases: *Ex parte Turner* (1879), 3 Woods (U. S.) 603; *Ex parte Geissler* (1880), 4 Fed. Repr. 188; *Electoral College of South Carolina*, 1 Hughes (1876), 571; in the execution of a replevin, issued from the United States Court: *Ex parte Thompson* (1876), 1 Flippin 507.

Note should here be made that, for want of space, this annotation does not include any late cases of release of citizens and foreigners, held under the operation of void State laws, or judgments of State Courts: *e.g.*, *In re Loney* (1889), 38 Fed. Repr. 101, affirming *Ex parte Bridges, supra*, page 647. (s. c. *sub nom. Brown v. U. S., ex rel. Bridges*, 14 AMER. LAW REG. 566, where a fuller statement of the facts is given, together with the opinion of ERSKINE, J.)

So, too, the question of the executive power which directed the Deputy Marshal to accompany Justice FIELD, is too wide to be appended to a discussion of the chosen point in the decision of the principal case. And the same is true of the cognate question of the powers of United States Marshals and their deputies, in preserving peace.

The fundamental question in the principal case was what summary relief could the United States extend to its officer, when a particular State not only failed of its duty, but also sought to subject to a criminal prosecution that officer who acted in the emergency as an officer, and, as he believed, in obedience to his instructions.

JOHN B. UHLE

Supreme Court of Minnesota.

DOBBIN v. CORDINER.

A married woman is estopped from obtaining the cancelation of her deed, regularly executed and acknowledged and subsequently delivered by her husband to an innocent purchaser, notwithstanding the proof that at the time of the execution and acknowledgment of the deed, there was a blank for the name of the grantee, and that the wife did not know what property the deed conveyed.

Appeal from the District Court of Hennepin County.

Hart & Brewer for appellant.

Wilson & Lawrence for respondent.

DICKINSON, J., July 2, 1889. This action is prosecuted for the purpose of securing the cancelation of a deed of conveyance from the plaintiff and her husband to the defendant. The plaintiff seeks to avoid the deed upon the grounds, that, as she alleges, the deed when executed by her, was incomplete, not containing the name of the grantee, nor any description of the property conveyed; that by her husband's misrepresentations, she was induced to sign and acknowledge the instrument in its incomplete form, and that he afterward, without her authority, inserted the name of the defendant as grantee, and the description of the property, and delivered the deed to the defendant.

By the findings of the Court, the following facts are established: The land had been purchased by the plaintiff's husband, who paid a part of the purchase price. The conveyance was made to the plaintiff, who gave a mortgage upon the property for an unpaid part of the purchase price. That the plaintiff's husband, having bargained with the defendant for the sale of the land to him, prepared a deed for the conveyance of the property, complete in form, except that it did not contain the name of any grantee. He requested the plaintiff to execute it, and without objection she signed and acknowledged it, the husband also joining in the execution of it. She delivered the deed after her acknowledgment to her husband, for the purpose of completing and delivering it to the purchaser. The husband then wrote in the name of the defendant as grantee, delivered it to him and the latter received the deed, paid the

price to the plaintiff's husband in good faith without notice of any defects or omissions in the making or execution of the deed.

He assumed as part of the consideration the payment of the outstanding mortgage on the property. The plaintiff's allegations as to the fraudulent procuring of her execution of the deed were not sustained by the findings of the Court.

It is conceded on the part of the appellant, the plaintiff, that, in general, one executing a deed of conveyance may give authority to another, by parol, to insert in the deed, after its execution, the name of a grantee, the grantee not having been before named in the deed; but it is contended that a wife cannot confer such authority upon her husband. We deem it unnecessary to decide whether this distinction can be recognized. Without regard to that question, and however it might be decided, we are of the opinion that by her conduct, the plaintiff is precluded, upon the principle of estoppel, from asserting, as against the defendant, the invalidity of this deed.

Our statutes have gone far to remove the common law disability of married women. The property held by them at the time of marriage, continues to be their separate property after marriage. They may, during coverture, receive, hold, use and enjoy property of all kinds, and the rents, issues and profits thereof, and all avails of their contracts and industry, free from the control of their husbands. They are capable of making contracts by parol, or under seal. They are bound by their contracts, and responsible for their torts, and their property is liable for their debts and torts, to the same extent as if they were unmarried. Their power to contract, and to convey real estate, is, however, so far qualified, that they cannot contract with their husbands relative to the real estate of either, or by power of attorney, or otherwise, authorize their husbands to convey their real estate, or any interest therein; and, in general, in all conveyances, by married women, of their real estate, their husbands must join.

Married women cannot enjoy these enlarged rights of action and of property, and remain irresponsible for the ordinary legal and equitable results of their conduct. Incident to this power of married women to deal with others, is the capacity

to be bound, and to be estopped, by their conduct, when the enforcement of the principle of estoppel is necessary for the protection of those with whom they deal; although there are, without doubt, limitations upon the application of this doctrine: *Norton v. Nichols* (1876), 35 Mich. 148; *Reed v. Morton* (1888), 24 Neb. 760; *Knight v. Thayer* (1878), 125 Mass. 25; *Bodine v. Killeen* (1873), 53 N. Y. 93; *Powell's Appeal* (1881), 98 Pa. 403; *Fryer v. Rishell* (1877), 84 Id. 521; *Godfrey v. Thornton* (1879), 46 Wis. 677; *Lavasser v. Washburn* (1880), 50 Id. 200; *Baum v. Mullen* (1872), 47 N. Y. 577; *Patterson v. Lawrence* (1878), 90 Ill. 174; *Reis v. Lawrence* (1883), 63 Cal. 129; *Sharpe v. Foy* (1868), L. R. 4 Ch. 35; *In re Lush's Trusts* (1869), Id. 591; 2 Pom. Eq. Jur. 814.

This plaintiff had power to convey her estate by deed, in which her husband should join. She executed and acknowledged this deed, knowing that it was a deed of conveyance, and contemplating that it was to be delivered, and have effect as such, and that the purchaser would pay a consideration therefor. The deed was delivered, as she intended it should be, to a purchaser, who in good faith, supposing the conveyance to be in all respects valid and effectual, has paid the consideration therefor. Even if her authority to her husband, implied from the circumstances, to fill in the name of the grantee, was ineffectual to legally empower him to do so, she ought not now to be allowed in a court of equity, to defeat the title of the purchaser upon that ground. A grantor not under disability from coverture, would be estopped under such circumstances: *Pence v. Arbuckle* (1876), 22 Minn. 417. It is equitable that the same principle be applied here for the protection of the defendant; and to so apply it, does not, we think, defeat the purposes of the statute declaring invalid any power of attorney or other authority, as between husband and wife, to convey real estate.

It is immaterial in our view of the case, whether or not, there was an express authorization of the husband to fill in the name of the grantee. It is enough that the plaintiff intended the instrument to have effect as a conveyance, and that she allowed her husband to take it, after she had executed it, for the pur-

pose of delivering it to the purchaser, as a deed of conveyance executed by her. That the plaintiff supposed that her husband was to deliver this deed to the purchaser, is shown by her own testimony.

The extent of the proof, on the part of the plaintiff, as to the misrepresentations of her husband, was that he said to her, when he asked her to execute the deed, that he would like to sell a lot. Without considering what might have been the effect of fraudulent misrepresentations of the husband, in a case where the wife was not chargeable with negligence in the transaction, we regard this evidence as wholly insufficient to justify the granting of relief as against an innocent purchaser. With regard to the rights of purchasers, it was culpable negligence on the part of the plaintiff to execute the conveyance, unless she is to be bound by it. The language of her husband did not justify her in executing the deed without reading it, or at least without more definite information as to its contents, unless she was willing to allow the deed to have effect whatever the property conveyed might be. It is therefore unnecessary to pass upon the question of the admissibility of the husband's testimony going to rebut the plaintiff's testimony in this particular, and which, as it seems, the Court below did not consider.

The deed was effectual as a conveyance, although there was but one subscribing witness : *Morton v. Leland* (1880), 27 Minn. 36; *Johnson v. Sandhoff* (1883), 30 Id. 197; *Conlan v. Grace* (1886), 36 Id. 276.

The evidence justified the findings of fact.

Judgment affirmed.

With all due deference to this learned Court, it is difficult to understand how and in what way the doctrine of estoppel is applicable to this case. If the wife had capacity to execute a deed containing blanks, it is valid, and if she had not the capacity, it is not valid. The question is one of capacity to execute such a deed, and not one of estoppel. If she had capacity to execute the deed,

then the doctrine of estoppel might arise, but no act of her own, or false representation, can confer upon her a capacity which she has not under the law. On the other hand, if a *feme covert* can execute a deed with one blank, she can do so with two or more blanks, because the principle is the same, and thus blank deeds might be executed. If she has the capacity to

execute such a deed, then her act constituting her husband her agent, might raise the question of estoppel; but it must first be settled that she has this capacity.

Now, she has or has not this capacity by virtue of the enabling statutes. The Minnesota statute is substantially those of the other States, except the provision prohibiting the wife from contracting with her husband concerning her real estate, or authorizing him to convey any interest therein.

The proposition is, a married woman cannot execute a deed with blanks in it. At common law she could not convey her own land by any direct mode of alienation. To circumvent this, fines and recoveries were introduced, the essential part of which was the judicial privy examination. In equity, the doctrine of the *jus disponendi* of the separate estate was, after a long struggle, settled to be, that the *feme covert* had no power to dispose of the separate estate but that conferred by the instrument which created it. By the fine and common recovery, the privy examination could only be taken upon a completed assurance; that is to say, a deed could not be executed, if there were any blanks in it. By the equity doctrine of *jus disponendi*, she could only dispose of her estate in the specific mode and manner pointed out in the instrument creating it. Hence, under both jurisdictions, a *feme covert's* deed was required to strictly comply with the mode and manner prescribed. The enabling statute takes the place of both of these methods, and is controlled by the rule applicable to those methods, namely, that a *feme covert* has no capacity to dispose of her statutory estate, but in the mode and manner specifically pointed out in the statute. This rule is not applicable to conveyances by persons *sui juris*; hence the question, whether or not a person *sui juris*, can

execute a deed containing blanks, must not be mixed with the question, whether or not a married woman can do it.

The identical question involved in the principal case, was decided by the Supreme Court of the United States in *Drury v. Foster* (1864), 2 Wall. (69 U. S.) 24. In that case, the mortgage of the wife's Minnesota land, was drawn with blanks for the mortgagee's name and the sum to be borrowed. The wife executed it in this shape, knowing that the blanks were to be filled up by the husband. The deed was delivered to the husband, to enable him to borrow the money. Drury agreed to loan \$12,800, and thereupon the husband inserted Drury's name as mortgagee, and the amount. The Court held that the mortgage was *void* as to the wife, because under the Minnesota statute, and the common law, she cannot execute a deed by procuration; cannot authorize any one to fill up the blanks and deliver the mortgage; there could be no acknowledgment, until the blanks were filled; until then, there was no deed to be acknowledged; and her act and the act of the officer were nullities.

"It is insisted, however," said the Court, "that Mrs. Foster should be estopped from denying that she signed and acknowledged the mortgage. The answer is this, that to permit an estoppel to operate against her, would be a virtual repeal of the statute that extends to her this protection (the privy examination upon a completed deed), and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyances of the real property of *feme coverts*. Instead of the transaction being a real one, in conformity with established law, conveyances by signing and acknowledging blank sheets of paper, would be the only formalities required. The consequences

of such a system are apparent and need not be stated." And that, whilst the weight of cases held that parol authority was sufficient to authorize the alteration or addition to sealed instruments, executed by persons *sui juris*, yet this could not be done by a married woman, because it would be a virtual repeal of the statute, which requires a privy examination upon a completed deed, and the Minnesota statute, which prohibits such authorization to a husband, and also a denial of the common law, which forbids the conveyance of a married woman by procuration.

Upon the same question, and a similar state of facts, Judge DILLON, in *Simmes v. Hervey* (1865), 19 Iowa 273, held that the mortgage was void, because executed without the name of the grantee, and description of the property; stating, after a careful review of the cases, that it was safer to deny the power by parol, to fill the blanks after the execution of the mortgage, unless re-delivered, confirmed, ratified, or adopted; and distinguished that case from *McHenry v. Day* (1863), 13 Iowa 445; and *Baldwin v. Snowden* (1860), 11 Ohio St. 203.

In *Burns and Wife v. Lynde* (1863), 6 Allen (Mass.) 305, the Court held that a printed deed, signed and sealed in blank by a married woman, the blanks filled up in her absence, but by her parol authority, *was void*, unless afterwards re-delivered, or adopted, when in a completed state; because any other rule would be dangerous and subversive of public policy, substituting parol evidence for the sanctity of a deed. The principle involved is well enforced in this opinion.

These are the leading cases, decided by well-known jurists, after careful consideration and exhaustive research; they are founded upon the fact that a married woman's capacity to convey comes from the statute. The mode and

manner prescribed by the statute must be strictly followed.

The rule at common law, in equity, and under the statute, is the same, which is, that she has no power to dispose but that conferred in the instrument creating it, and if this instrument, or the power creating the estate, provided that the disposition, or alienation, must be by deed duly executed and delivered after privy examination, that requirement must be complied with. Under the fine and recovery, it was required that the deed be complete, containing the grantor, the grantee, and the thing granted, duly executed and delivered upon privy examination. In equity, the power of appointment, and the power of disposition, were restricted to the mode and manner specifically pointed out in the instrument. The same rule applies to the statute. Hence, drawing from the principles which controlled the fine and recovery, and the doctrine of *jus disponendi*, the rule under the statute is that a married woman has no capacity but that which is conferred by the statute, and that power—*jus disponendi*—must be strictly followed. The manner and form must be strictly pursued. If formalities are prescribed, these must be followed. If signing and sealing were required, that must be performed. If the *jus disponendi* is required by instrument in writing, duly acknowledged, that must be strictly followed. If a privy examination was required it meant such examination of a completed instrument, and in no instance was the *jus disponendi* allowed to be exercised by blank deed or by procuration. The principle that the statute is the instrument creating the separate estate, and regulates the manner and form of the *jus disponendi* and must therefore be strictly pursued, is the reason for that class of cases which hold that if the conveyance of a *feme covert* is not executed according to the man-

ner and form prescribed by the statute it is void: *Morrison v. Wilson* (1859), 13 Cal. 498; *Elliott v. Piersol* (1828), 1 Pet. (26 U. S.) 328; *Hepburn v. Dubois* (1838), 12 Id. (37 U. S.) 345; *West v. West* (1823), 10 S. & R. (Pa.) 445; *James v. Fiske* (1847), 9 S. & M. (Miss.) 152; *Jenkins v. McConico* (1855), 26 Ala. 213; *Palmer v. Cross* (1843), 1 S. & M. (Miss.) 48; *MacLay v. Love* (1864), 25 Cal. 374; *Dentzel v. Waldie* (1866), 30 Id. 142; *Bodley v. Ferguson* (1866), 30 Id. 517; *McIntosh v. Smith* (1847), 2 La. An. 758; *Bisland v. Provosty* (1859), 14 Id. 169; *Lowell v. Daniels* (1854), 2 Gray (Mass.) 161; *Keen v. Hartman* (1865) 48 Pa. 497; *Bemis v. Call* (1865), 10 Allen (Mass.) 512; *Glidden v. Strupler* (1866), 52 Pa. 400; *Todd v. R. R.* (1869), 19 Ohio St. 514; *Lothrop v. Foster* (1863), 51 Me. 367.

The cases cited by the Minnesota Court do not apply to the question involved in the case before it, except that of *Reed v. Morton*, *infra*, which does not appear to have been well considered. *Horton v. Nichols* (1876), 35 Mich. 148, was a case of irregular acknowledgment, and not of capacity to make the acknowledgment; and the cases cited by the Michigan Court to support its position (*Sharpe v. Foy* (1868), L. R. 4 Ch. 35, and *In re Lusk's Trust* (1869), Id. 591), were cases of the wife's equity to a settlement under the English doctrine; the former holding her right to the equity was barred by her recital in her duly executed deed; and the latter that her regular and lawful assignment of her reversionary interest in a trust fund, barred her equity to a settlement. The case of *Knight v. Thayer* (1878), 125 Mass. 25, held that the wife's covenant of warranty, in her lawfully executed deed, was binding, and not that she had capacity to make the deed. In *Powell's Appeal* (1881), 98 Pa. 403, the wife's

release of her legacy was held good because she had capacity to dispose of this chose in action. In *Bodine v. Killen* (1873), 53 N. Y. 93, the wife was held bound by her contract entered into through her agent. She was lawfully conducting the grocery business, and her husband was her lawful agent in creating the obligation sued on. This was a case of agency, not a case of capacity to execute a blank deed, and the general proposition made by this Court in this case, so often misapplied, that to the extent a married woman is empowered to contract, she may be bound in the same manner as if unmarried, is correct as applied to the case in hand and as a general proposition, but here, as in other cases, the capacity to make the contract must be first settled. In *Fryer v. Rishell* (1877), 84 Pa. 521, the wife's application to rescind her assignment of a contract to purchase realty, was refused, unless the consideration received was restored. *Godfrey v. Thornton* (1879), 46 Wis. 677, held that the wife's mortgage, without attestation, or acknowledgment, was valid, because the statute conferred the power, and she complied with the statutory *jus disponendi*. This was the ruling in the cited case of *Lavassar v. Washburne* (1880), 50 Wis. 200. In *Baum v. Mullen* (1872), 47 N. Y. 577, the wife was held responsible for the fraudulent representations of her husband, who was her agent in the transaction. *Patterson v. Lawrence* (1878), 90 Ill. 174, asserted the principle in *Fryer v. Rishell*, *supra*, and followed the Illinois doctrine, that estoppel comes from tort, not contract, as announced in *Oglesby Coal Co. v. Pasco* (1875), 79 Ill. 164; *Schwartz v. Saunders* (1867), 46 Id. 18; *Anderson v. Armstead* (1873), 69 Id. 452, and does not touch the question whether she can execute a deed in blank. In *Reis v. Lawrence* (1883), 63 Cal. 129, the wife's

deed was held valid, although her divorce was void, because all her property rights and the rights of others, acquired under the impression that the deed was good, were protected on the ground of public policy.

The Nebraska case of *Reed v. Morton* (1888), 24 Neb. 760, sustains the position that a *feme covert* can execute a blank deed. It is true that other elements also existed, namely, that it was in the hands of an innocent purchaser, and that the wife knew, when executing it in blank, that her husband would fill the blanks, obtain the money, and deliver the deed. The infirmity of this case lies in the fact that it is against the leading cases and principles; and the cases which it cites do not support its position, because they are cases of persons *sui juris*. Besides, the Nebraska statute does not inhibit, as does the Minnesota statute, deeds made by procuration.

It remains, therefore, to be shown that the true principle involved in the question (whether or not a married woman can execute a deed with blanks in it) is that declared in *Drury v. Foster* (1864), 2 Wall. (69 U. S.) 24; *Burns v. Lynde* (1863), 6 Allen (Mass.) 305.

This was applied to the deed of a *feme covert*, in *Hibblewhite v. McMornil* (1840), 6 M. & W. 200, after an exhaustive discussion of the cases, and expressly overruled the case of *Texira v. Evans* (cited in *Master v. Miller* (1791), 1 Anst., at p. 228). The line of cases which follow the doctrine that a married woman is estopped from seeking the invalidity of her deed executed in blank, begin at that case, as authority for this doctrine of estoppel. In that case, Lord MANSFIELD decided that a personal bond, executed in blank by a person *sui juris*, could be subsequently filled by parol authority; not that a married woman or a person under disability, could do this.

Texira v. Evans, *supra*, has been followed in *Wooley v. Constant* (1809), 4 Johns. (N. Y.) 54; *Ex parte Kerwin* (1828), 8 Cow. (N. Y.) 118; *Bank of Buffalo v. Kortright* (1839), 22 Wend. (N. Y.) 348; *Chauncy v. Arnold* (1862), 24 N. Y. 330; *Wiley v. Moor* (1828), 17 S. & R. (Pa.) 438; *Boardman v. Gare* (1829), 1 Stew. (Ala.) 517; *Richmond Mfg. Co. v. Davis* (1845), 7 Blackf. (Ind.) 412; and disapproved and rejected in *Boyd v. Boyd* (1819), 2 N. & McC. (S. C.) 125; *Gilbert v. Anthony* (1821), 1 Yerg. (Tenn.) 69; *Byers v. McClanahan* (1834), 6 G. & J. (Md.) 250; *Ayers v. Harness* (1824), 1 Ohio 368; *U. S. v. Nelson* (1822), 2 Brock. (U. S. C. Ct., Dist. Va.) 64; *People v. Organ* (1861), 27 Ill. 27; *Davenport v. Sleight* (1837), 2 Dev. & Bat. (N. C.) 381; *King v. Brooks* (1848), 9 Ired. (N. C.) 218; *Cross v. State Bank* (1845), 5 Ark. 525; *McMurty v. Frank* (1826), 4 T. B. Mon. (Ky.) 39; *Arrington v. Burton* (1851), 19 Ala. 114.

"No person," said RUFFIN, Ch. J., in *Davenport v. Sleight* (1837), 2 Dev. & Bat. 381, "will argue in favor of a deed of conveyance in which the name of the bargainee, or the description of the land, was inserted after the execution by the vendor, in his absence, although done without corruption, or by some person whom he requested to do it. It would subvert the whole policy of the law, which forbids titles from passing by parol, and requires the more permanent evidence of writing and sealing."

"A transfer to a person not named," said DENIO, J., in *Chauncy v. Arnold* (1862), 24 N. Y. 330, "or in any way described, or designated, is * * a mere nullity. To hold otherwise would let in the mischief intended to be guarded against in requiring a writing under seal to work a disposition of property. But although there is some diversity in the

cases, I am of opinion that none of modern date countenance the method of creating a title to, or a lien upon land," by the insertion of the name of the mortgagee after delivery. "Cases arising upon bills and notes are plainly distinguishable:" these and bonds for money, official bonds, and stock certificates if issued in blank, may be filled up. "But no one," he adds, "would be bold enough to contend that a paper, intended to operate as a mortgage, could be put in circulation in such a shape, and by filling up, could be made obligatory on any one. This doctrine is limited strictly to commercial paper, and is based solely on its negotiable quality." To same effect is *Ingram v. Little* (1853), 14 Ga. 173; and 2 Washb. R. P. 554.

Upon these principles and this reasoning announced, all the decisions can be harmonized. In New York, the case of *Woolley v. Constant* (1809), 4 Johns. 54, seems to be against this position, but in *Bodine v. Killeen* (1873), 53 N. Y. 93, it is supported. In the language of the Court, "the law will not permit one legally incapacitated to do that indirectly which she cannot do directly. This is especially the case with infants and married women * * *; the law imposing the disqualification from motives of public policy, and for the safety of those regarded as weak and needing protection:" citing and approving *Keen v. Coleman* (1861), 39 Pa. 299; *Lowell v. Daniels* (1854), 2 Gray (Mass.) 161; and *Goulding v. Davidson* (1863), 26 N. Y. 604. In Massachusetts, besides the leading case of *Burns v. Lynde* (1863), 6 Allen 305; *Plummer v. Lord* (1862), 5 Id. 460, and *Lowell v. Daniels* (1854), 2 Gray 161, support the doctrine, and in the latter case, the separate deed of the wife was declared invalid, because the statute required a joint deed. It is there stated that a *feme covert* cannot

do by estoppel, what she cannot do by deed, and that she is incapable of making a conveyance by estoppel *in pais*, and that no case can be found where a party was barred by estoppel *in pais*, who was incapable of conveying by deed.

The doctrine is followed in Pennsylvania: *Glidden v. Strupler* (1866), 52 Pa. 400; *Keen v. Hartman and wife* (1865), 48 Id. 497; *Keen v. Coleman* (1861), 39 Id. 299. In this State the doctrine that the wife has no capacity but that conferred by the law, is strictly followed. The case which seems to differ, or contravene this principle: *Wiley v. Moor* (1828), 17 S. & R. 438, rests on the doctrine of estoppel, as applied to obligations disconnected with real estate, and where the wife's capacity to enter into the contract was not questioned.

In *Glidden v. Strupler*, *supra*, her separate agreement to sell her land was held void, although she had received part of the purchase money and the purchaser made improvements thereon with her knowledge and encouragement, because she had no capacity to contract for the sale of her real estate or to convey it, except by the precise mode named in the statute, namely, by joint deed, duly executed, and upon privy examination; and hence, as she did not have capacity to make the agreement, she could not ratify or confirm it, and therefore there could be no estoppel, even though she received the consideration, and improvements had been erected by an innocent party. This case reviews all the prior decisions.

Though these cases do not directly assert the proposition that the deed of a *feme covert*, executed with blanks in it, is void, because she has no capacity to execute such a deed; yet, they established the rule that she has no capacity but that expressly given in the statute. She was disabled at common law and

under the equity doctrine, from executing such a deed, and the privy examination could only be had upon a completed deed. She retains this incapacity unless the statute expressly removes it, and provides in so many words that she can convey by such a deed; hence the rule that she has no capacity but that which the statute confers. If it does not empower the execution of a deed in blank, she cannot do it, because she could not do it at common law. The same doctrine was held in *Keen v. Hartman* (1865), 48 Pa. 497, and *Keen v. Coleman* (1861), 39 Id. 299, holding that, as she had no capacity to execute the mortgage or bond, she was not liable for the false representations of her capacity (that she was unmarried), which induced third parties to contract with her, because the statute did not empower her to make such a contract in such way.

The Alabama cases are governed by the same principle: *Martin v. Martin* (1853), 22 Ala. 86; *Jenkins v. McConico* (1855), 26 Id. 213.

In *Morrison v. Wilson* (1859), 13 Cal. 498, the mortgage of the married woman's lands, executed by her trustee holding the legal title, on the faith of her representations that the trustee was the sole owner, was declared invalid, because she can convey her land, and be divested of title, only according to the forms prescribed in the statute, and that estoppel *in pais* has no application to the estates of a married woman.

This was followed in *MacLay v. Love* (1864), 25 Cal. 374; *Dentzel v. Waldie* (1866), 30 Id. 142; *Bodley v. Ferguson* (1866), 30 Id. 517.

[In *Chase v. Palmer* (1862), 29 Ill. 306, BREESE, J., said: "This deed is wanting in one essential; namely, a grantee, and is therefore void. It might be very convenient, and probably productive of no injury to any interest of society, that a party, wishing to sell a

tract of land, should be permitted to execute and deliver the deed to an agent, with a blank for the name of the grantee, to be filled up when a purchaser should be found, but the law does not permit it."

The Illinois cases were reviewed in *Oglesby Coal Co. v. Pasco* (1875), 79 Ill. 170, holding that the wife's verbal agreement to release her interest in realty, was not an estoppel, although she received the consideration, because her title could only be divested by deed duly acknowledged, as provided by the statute.

[Again, in *Simms v. Hervey* (1865), 19 Iowa 288, DILLON, J., said: "A deed signed in blank is not, in the sense of the law, executed. There must still be under our statute, as at common law, a grantor, a grantee, and a thing to be granted, and these must be described in the writing." But, in *Devin v. Himer* (1870), 29 Iowa 299, "the plaintiff and his wife executed the deed for the defendant, and only left the name blank because they did not know it in full; he was the specific grantee intended; he had express and full authority to insert his own name, and it was the intention he should do so, and it was delivered for that object and purpose; his name was inserted pursuant to that intention; the grantors ratified the same and claim the benefit of the delivery and of the perfected deed. * * * * * We have no hesitation in holding the deed valid and complete, nor would we if the plaintiff were seeking to avoid it:" COLE, C. J.

[In *Quinn v. Brown* (1887), 71 Iowa 376, the wife joined her husband in executing and acknowledging a deed with the consideration and name of the grantee blank, and left such deed with her husband, who sold the land to an innocent purchaser for value, inserting the name and the consideration, and delivering the deed to him: she was

not permitted to assail the title, SEEVERS, J., saying—"The pivotal question is, did she execute the deed in blank, and leave it with her husband? * * * She may not possibly have known the character of the instrument, * * * and as Brown had no knowledge that it had been fraudulently procured, and as we find he is a purchaser for value, he should be protected."

The doctrine in Louisiana is the same as in California: *Bistand v. Provost* (1859), 14 La. An. 169.

In *Lathrop v. Foster* (1863), 51 Me. 367, a married woman was not estopped by her deed, intended as a release of dower, because it contained no words of release, as the statute prescribed; and see *Rangely v. Spring* (1842), 21 Me. 130, where it was held that a married woman cannot be bound by her verbal assent or actual knowledge of a conveyance of her lands by her husband; and that her knowledge of, or assent to, such conveyance, is not necessary in order to render the deed operative against the husband.

The Maine Court recognized the distinction between parol authority to fill a bond, and a deed: *Inhabitants of South Berwick v. Huntress* (1865), 53 Me. 89. The case of *Van Etta v. Evenson* (1871), 28 Wis. 33, does not impinge upon this doctrine, because that was a mortgage by a person *sui juris*, and it was held good, on the ground that the paper should have the effect that the parties, at the time of its execution, intended it should have.

[*Cooper v. Page* (1872), 62 Me. 192;

here was no authority and no ratification of the act done, and the Court distinguished *South Berwick v. Huntress* on this ground.

The Mississippi Court announced the same doctrine in *Palmer v. Cross* (1843), 1 Sm. & M. 48 (Miss.), holding that the statute provided the only mode by which a married woman could be divested of her title; namely, by deed duly acknowledged.

The principle contended for was applied in Ohio (*Todd v. R. R.* (1869), 19 Ohio St. 514), holding that a married woman's writing, intended as a dedication, duly executed, acknowledged, and recorded, did not estop her from claiming the land, although the defendants acquired valuable rights under the belief that the dedication was valid; on the ground that she could only dispose of, or encumber land, in the manner specifically prescribed by the statute, and what she could not deprive herself of by direct and express contract, she could not lose by way of estoppel; citing *Miller v. Hine* (1862), 13 Ohio St. 565; and *Purcell v. Goshorn* (1848), 17 Id. 165.

[But in *Galbrath v. Lunsford* (1888), 87 Tenn. 89; S. C. 28 AMERICAN LAW REGISTER 126, it was held that a married woman may, by acts *in pais*, done without any intentional fraud, estop herself to assert title to her realty against persons misled to their prejudice by such acts, and this notwithstanding the statutory requirements.

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ABSTRACTS OF RECENT DECISIONS.

ACCIDENT INSURANCE.

"*Accidental*," as used in a policy, is properly defined as "happening by chance ; unexpectedly taking place ; not according to the usual course of things, or not as expected." *United States Mut. Accident Asso. v. Barry*, S. Ct. U. S., May 13, 1889.

Jumping from platform, four or five feet above the ground, whereby injuries are sustained which subsequently result in death, is sufficient to warrant a recovery under an accident policy ; especially is this the case where the evidence shows that two companions of the insured had made the same leap immediately before him, and in his presence, and had alighted safely. *Id.*

ADMIRALTY.

Limited Liability Act of 1851 (Rev. Stat. U. S., Secs. 4283-5), which provides that the liability of a ship-owner "for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge" of the owner, shall in no case exceed the value of the interest of the owner, applied to damages for loss of life, and where the owner has taken appropriate proceedings to obtain the benefit of that Act, the person injured is barred of the right to maintain a separate action for such injuries ; it makes no difference that the injury, although within the jurisdiction of the admiralty courts, happened within the technical limits of a county of a State, under whose laws the liability was sought to be enforced. *Butler v. Boston & S. S. S. Co.*, S. Ct. U. S., April 22, 1889.

ALIENS.

Exclusion of aliens from the United States may be made by Congress, even in times of peace, for any reason that may be deemed sufficient. *Chae Chan Ping v. United States*, S. Ct. U. S., May 13, 1889.

ATTORNEY-AT-LAW.

Employment at fixed salary of an attorney for a corporation, which salary, as well as the term of his employment, may be changed at the option of the latter, does not render illegal or improper a contract made by such attorney with the corporation for a special fee in a special case, no misrepresentation being made. *Bartlett v. Odd Fellows' Sav. Bank*, S. Ct. Cal., May 23, 1889.

BANKS AND BANKING.

Certificate of deposit in a Leadville bank was deposited for collection with a bank at Denver ; the latter bank mailed the certificate to the bank, by which it was certified, stating that the inclosure was for "collection and credit ;" not getting a response in due course of mail, the Denver bank sent a telegram of inquiry and received reply : "No such remittance received ;" thereupon the Denver bank wrote to its depositor, directing him to get a duplicate cer-

tificate, but, before the letter was received, the Leadville bank had failed; the Denver bank was liable for the amount of the deposit. *German Nat. Bank of Denver v. Burns*, S. Ct. Colo., May 3, 1889.

BILLS AND NOTES.

Alteration of promissory note, without the knowledge of the maker, by adding after the name of the bank, where it is payable, the words "of Oak'd," the note being dated at Oakland and being made "payable at the First National Bank of this city," by filling in the rate of interest, which was left blank by the maker, and by writing the words "Receipt No. 124" at the end of the note, does not affect the validity of the note so altered. *First Nat. Bank of Oakland v. Wolff*, S. Ct. Cal., April 27, 1889.

CONTRACTS.

Covenant by assignor of the exclusive right to manufacture and sell a secret medicinal compound in certain States and Territories, that he will not manufacture or sell such compound in the territory named, coupled with an agreement by the assignees not to manufacture or sell it in any other territory, is not contrary to public policy, as being in restraint of trade. *Fowle v. Parke*, S. Ct. U. S., May 13, 1889.

COPYRIGHT.

Omission of year and name of the person taking out a copyright, or of the name only, in the statutory notice, will bar an action for infringement, even though the infringer took out the copyright himself and afterwards sold it to the complainant. *Thompson v. Hubbard*, S. Ct. U. S., May 13, 1889.

CORPORATIONS.

Agreement by incorporators of a proposed corporation to take the shares of one of the subscribers within a fixed time, if he should so desire, and refund his money, is valid in the absence of any fraudulent intent, although none of the subscriptions were to be paid in until all the stock should be reliably subscribed, and the subsequent subscribers were not parties to such agreement and had no knowledge that it had been made. *Morgan v. Struthers*, S. Ct. U. S., May 13, 1889.

DAMAGES.

Prospective damages may be recovered in an action against a municipal corporation for personal injuries sustained by falling into an excavation dug under the municipal authority. *Townsend v. City of Paola*, S. Ct. Kan., May 10, 1889.

Rupture, sustained by a man fifty-eight years of age and engaged in the piano trade, which required lifting, who had earned \$300 per month prior to the accident, but had been unable to work at his business since, will warrant a verdict of \$7,000 against the corporation, whose negligence caused the injury. *Weidekind v. Southern Pac. Co.*, S. Ct. Nev., May 23, 1889.

DOWER.

Value of widow's dower in lands aliened by her husband in his lifetime, is to be determined as of the time of valuation, deducting therefrom any increase which may have arisen from the labor and money of the purchaser. *Baden v. McKenny*, S. Ct. D. C., June 24, 1889.

ERROR.

Appeal by United States will lie to a judgment in the District Court, entered under the Act of Congress of March 3, 1887, giving that Court concurrent jurisdiction with the Court of Claims, where the claim does not exceed in amount \$1,000, when such judgment is against the United States, even though it is only for \$25 and costs. *U. S. v. Davis; U. S. v. Schofield*, S. Ct. U. S. May 13, 1889.

FIRE INSURANCE.

Arbitration clause in a policy, which provides that "in case of differences touching the loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial appraisers, whose award in writing shall be binding on the parties," is too vague to give the insurer a right to demand arbitration, and a refusal by the insured of such a demand will not prevent recovery on the policy. *Case v. Manufacturers' Fire and Marine Ins. Co.*, S. Ct. Cal., May 31, 1889.

FIXTURES.

Pump and boiler placed by a railroad company upon land which it erroneously supposed to be its own, and used for several years for the purpose of pumping water from a well on the same land, may be removed, upon discovery of the error; such use does not constitute them fixtures. *Atchison, T. & S. F. R. R. Co. v. Morgan*, S. Ct. Kan., June 7, 1889.

GAMBLING CONTRACT.

Purchase on margin of cotton for future delivery, where the purchase and delivery of actual cotton is not contemplated by the parties, but it is understood between them that settlement is to be made by one party paying to the other the difference between the contract price and the market price at the time designated for delivery, according to the fluctuations of the market, constitutes a wager, and notes given for losses sustained by one of the parties in carrying such "futures," are void. *Embrey v. Jemison*, S. Ct. U. S., May 13, 1889.

LIMITATION.

Federal Courts will enforce State statutes of limitation, in the absence of Congressional legislation. *Michigan Ins. Bank v. Eldred*, S. Ct. U. S., May 13, 1889.

NEGLECTENCE.

Barb-wire fence, if negligently constructed, will render the owner liable for injuries occasioned thereby to the domestic animals of others, although the fence is entirely on his own land. *Loveland v. Gardner*, S. Ct. Cal., May 28, 1889.

PARTNERSHIP.

Special partner is made liable to creditors as a general partner by a failure to comply with the statutory requirements relating to special partnerships, but such failure does not change the special into a general partnership. *Abendroth v. Van Dolsen*, S. Ct. U. S., May 13, 1889.

PRACTICE.

Imperfections in the pleadings of a cause are cured by verdict. *Palmer v. Arthur*, S. Ct. U. S., May 13, 1889.

PUBLIC OFFICERS.

Affidavit of United States Deputy-Surveyor, in regard to the manner in which he has fulfilled a contract for surveying, as required by Act of Congress, cannot be made before either a notary public, or a commissioner of the United States Circuit Court. *U. S. v. Hall*; *U. S. v. Reilly*, S. Ct. U. S., May 13, 1889.

TAXATION.

Exemption from taxation, granted by the charter of a railroad company, does not pass under a conveyance of its "property and franchises" in consequence of a judicial sale. *Pickard v. East Tennessee V. & G. R. R. Co.*, S. Ct. U. S., May 13, 1889.

TENDER.

Certified check was tendered in payment of a disputed balance, and, upon being refused, was deposited in Court for the purpose of keeping the tender good; the failure of the bank, pending the suit, did not relieve the debtor from payment of the amount admitted by him to be due. *Larsen v. Breene*, S. Ct. Colo., April 19, 1889.

TREATIES.

Violation of treaty with a foreign power is no objection to the validity of an Act of Congress; treaties may be modified or repealed by Congress in the same manner as statutes, and the wisdom of such modification or repeal is not a judicial question. *Chae Chan Ping v. United States*, S. Ct. U. S., May 13, 1889.

WATER-RIGHTS.

Non-user for a long series of years, by a corporation, of the exclusive right given by its charter to all the waters of a non-navigable stream, and the use and control of the same for mechanical, agricultural, mining and municipal purposes, will estop it from asserting such right to the exclusion of persons who have, in the meantime, acquired rights to the use of such stream by actual appropriation and use, under the general laws of the State. *Platte Water Co. v. Northern Colorado Irrigation Co.*, S. Ct. Colo., May 3, 1889.

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PUBLIC CHARITIES AND THE RULE OF *RESPONDEAT SUPERIOR*.

I. THE PENNSYLVANIA CASE.

The Supreme Court of Pennsylvania decided, in the case of the Fire Insurance Patrol (*Boyd v. Insurance Patrol* (1886), 113 Pa. 269; s. c. (1889), 120 Pa. 624), two questions which it is here proposed to discuss.

These were, first: Is a public charity exempt from the rule of *Respondet superior*; and second: What is the test or criterion of such a charity?

The Fire Insurance Patrol of the City of Philadelphia was incorporated by the special Act of Assembly of February 17, 1871 (P. L. 59), which, after conferring the usual corporate privileges, provided as follows—

§ 3. The object of the corporation shall be, to protect and save life and property, in or contiguous to burning buildings, and to remove and take charge of such property, or any part thereof, when necessary.

§ 4. The said corporation shall have power to provide suitable places for the transaction of its business, and also to provide a patrol of men, and a competent person to act as superintendent, with suitable apparatus to save and preserve life or property at or after a fire; and the better to enable them so to act with promptness and efficiency, full power is hereby given to such superintendent, and to such patrol, to enter any building on fire, or which may be exposed to or in danger of damage from fire or water, and at once proceed to protect and endeavor to save the property therein, and to remove such property, or any part thereof, during or after such fire; nothing in this Act, however, shall warrant an interference with the orders of the Chief Engineer of the Fire Department, in reference to the ac-

tion of firemen in their duties in extinguishing a fire; *Provided*, that nothing herein contained be construed to affect or interfere with the powers or duties of the officers of the Police Department of the City of Philadelphia, at fires occurring within the limits of the said city.

An action on the case was brought by the widow and minor child of Charles Boyd, against the Insurance Patrol, and two of its employes, to recover damages for having caused his death, and it appeared on the trial, that a few days after a fire, the employes of the Patrol went to the building where it had occurred, to remove the tarpaulins placed by them over goods in the fourth story. These bundles weighed about fifty pounds each, and one of the men threw them from their place in the building to the street below. Boyd, whilst walking beneath, was struck upon the back by one of these bundles, his spine was broken, and he died the next day. The trial Judge held that the defendant company was a charity and entered a nonsuit upon the authority of *Heriot's Hospital v. Ross* (1846), 12 Cl. & F. 506, but the Supreme Court reversed the judgment, and directed a new trial, in order that the Insurance Patrol might establish by evidence, additional to its charter, that it was exempt from the operation of the general rule of *Respondeat superior*: *Boyd v. Insurance Patrol* (1886), 113 Pa. 269.

Upon the second trial of the case, it was shown that the Patrol had no capital stock, declared no dividends, made no profits; that it was maintained by the voluntary contributions of insurance companies and insurance agents; that its employes endeavored to save all human life in danger by fire, and all property, whether insured or not, and did so in their attendance at about eleven hundred fires every year. Upon the part of the defendant, it was contended, and here arose the principal question of fact, that the contributing insurance companies were not in any way benefited by the association, apart from the general public; while the plaintiffs endeavored to show by their cross-examination of the insurance men testifying, that the companies profited by the decrease of loss upon insured property through the efforts of the Patrol. In the report of the case (120 Pa. 624), the evidence does not appear, but as printed in the paper books, seems fully to justify the charge of the Judge who presided at the second trial.

The president of the Insurance Company of North America testified—

Q. To what extent were they influenced in making that organization for the purpose of protecting and helping themselves, if any?

A. Not only as citizens, but as a corporation engaged in the business of insurance against fire, they naturally would be benefited by such an organization.

Q. Wouldn't they be very largely benefited, and was not that the great motive for their entering into the company?

A. They would be undoubtedly largely benefited, and it was a very potent motive in the establishment of the Fire Patrol.

Q. Wasn't it a most potent motive?

A. I can only speak for myself.

Q. Do you mean to say that if you had not been the president of the company engaged in insuring against fire, that you would voluntarily have entered the organization of this company and paid out your money?

A. We would not have had a right, as a company, to do so, unless it was for the interest of the Insurance Company of North America.

Q. Has not the practical working of this Insurance Patrol been a very decided benefit and advantage to all the parties who have entered into its formation, in the saving of goods that they have insured at fires?

A. It has.

The treasurer of the Patrol testified—

Q. Is not the practical work of this Fire Patrol such as to save these insurance companies, as a body, from a great deal of losses occurring at fires?

A. There cannot be any doubt about that.

Q. Isn't that the purpose for which these insurance companies, and these agents, contribute anything to support this Insurance Patrol?

A. That is one of the objects.

Q. Isn't that the great and leading object?

A. The charter of the company shows what the objects of the concern are.

Q. But isn't the great and leading purpose, which justifies your company in expending \$1,200 a year to keep this up, the fact that thereby your company is saved a great deal of loss on property on which you have insurance?

A. Largely so; yes, sir.

The president of the Patrol, a leading insurance man, testified—

Q. And is not the purpose for which you, as a fire insurance man, got it up, and have helped to carry it on, because it saved your companies from loss on property insured by them from fire?

A. Not alone.

Q. Is not that the leading purpose?

A. That is the leading purpose.

Q. But for that, would you carry it on at all?

A. Yes, sir, I think I would.

Q. You think you would organize this Patrol and support it, although it did not benefit your company at all?

A. I tried to do it before I was ever a member of an insurance company.

Q. And did not succeed?

A. I did not succeed.

Q. So that, until you made it appear to these insurance companies, that they would save money by having a Fire Insurance Patrol like this, you were not able to succeed?

A. After nine years' trial.

Q. Then you satisfied them that they would save money for their stockholders and they went into it?

A. They argued that it would not save money, and that is the reason they would not do it.

Q. But you persuaded them that it would?

A. Yes.

Q. And they finally went into it?

A. Yes, sir.

Q. They saw that it did save their money?

A. Yes, sir.

Q. And they carried it on from that time to this?

A. Yes, sir.

Q. And they intend to carry it on?

A. I hope so.

The secretary of the Patrol testified—

Q. Is it not a fact, that this Patrol Company, in plain English, is nothing but an agency adopted by the fire insurance companies, and the agents of the fire insurance companies, to lessen their losses at fires?

A. That is the main object of it.

The Court, leaving the question of negligence to the jury, charged, that under the evidence the defendant was not a charity and was responsible for the acts of its servants. A verdict and judgment having been obtained by the plaintiffs for \$2,500, the case was again removed to the Supreme Court, who held in an opinion by PAXSON, J. (the present Chief Justice), that the Patrol was, in the first place, an auxiliary of the Municipal Government, and, in the second place, that it was a public charity, because within the intendment of the statute of 43 Eliz.; and that the object of the donors of the fund, and not their motive, governed its legal effect. Upon the other branch of the case, the Court held that the Patrol was not liable for the negligence of its employes, because, in the first place, it was an agent for the performance of a public duty, and in the second place, because it was a public charity, whose funds were held upon a trust contributed for a specific purpose.

II. REVIEW OF ENGLISH AND AMERICAN CASES, IN SUPPORT.

The learned Justice, in holding that the Patrol Company, as a public charity, was not liable for its servants' torts, says that the doctrine is "hoary with antiquity, and prevails alike in this country and in England, where it originated as early as the reign of Edward V., and was announced in the Year Book of that period."

Upon examination, however, this early case, cited in argument by the plaintiff in error, is seen to be entirely aside from the question. The following is a translation (substantially correct, it is hoped), from Year Book, 1 Edward V. 4 B., case 10, A. D. 1483.

Assize of rent was brought by one John Worseley, Dean of the Chapter of (St.) Paul's, and by the Chapter, against one Alice Gloss. And the Dean and the Chapter made their plaint of XXIII shillings IV pence of rent, issuing out of three acres of land. Whereupon *Sulinard* comes for the defendant, who appears by attorney, and pleads (as before) freehold, and says that as concerns any rent issuing out of one of the acres, he holds the same acre jointly with John At Stile, who is in full life by feoffment of one R. D. who is not named in the writ. And he prays judgment of the writ; and as to this, if it be not so found, he says that he has committed no tort and no disseisin. And as concerns one other of the said acres, he says that he had no estate in the same land upon the day (of the writ) nor ever since, etc., and if it be not so found, *nul tort, nul disseisin*. And as concerns any rent issuing out of the land, he says that there should be no Assise; for he says that one William Saie (predecessor of the plaintiff), Dean of the same Chapter, came in the name of the said Dean and Chapter, at the Feast of St. Michael, and demanded the said rent of one John Maleon, being then tenant, and he paid; and since, at the Feast of St. Michael then next ensuing, the same Dean came as before and demanded the same rent, and the said Dean attempted to make distress; and the same J. M. made rescue; and then the said William Say died and the said Jo. Worseley was chosen Dean. *Without this*, that the said William Say or the said John Worseley, or any others, successors of the said William Say, himself, etc., was seised of the said rent since; in which case the said John Worseley should have his writ of Entry *sur disseisin*, of a disseisin made of his predecessor, and not Assise.

Vavisor (for the plaintiff): As to the first (plea, he replies) sole tenant; without this, that the other (*i. e.* John At Stile) has any estate. And this he is ready (to verify) and the others *e contra*. And as to the other (plea, he replies) tenant as the assise alleges. And this he is ready (to verify), and the others *e contra*.

And as to the third, this plea is not good, for it only amounts to the general issue, *scilicet*, that he (the plaintiff), was never seised so that he could be disseised; and, *for this*, he took issue; as, in writ of Dower, if the tenant shows that the husband of the demandant had merely a life estate, etc., this only amounts to the plea of

Ne Onques Seisi qu' Dower, so that he could endow her, on which the general issue is taken, and so here.

Brian (a Judge): As concerns these pleas: In Assise, the tenant shall have special matter in his plea, and especially when he is to have advantage for pleading this, and it shall be enquired by the assise. And so was the opinion of all the Justices.

Vavisor: For another reason it is not good; for it has shown a payment at the Feast of St. Michael and a payment and receipt at the Feast of St. Michael, and has not shown in what year, etc., so the plea is not good.

Catesby (a Judge): It shall be taken most strongly against him and therefore take your advantage, for it cannot be taken otherwise but that it was in the lifetime of W. S., and then it matters not to him whatever time it happened; so the plea is good enough, notwithstanding.

Vavisor: It is not good for another reason; and that is because a Dean and Chapter cannot be disseised of a rent, for they are always deemed in possession, for one cannot be disseised of a rent, or not disseised, at his pleasure; and therefore the law intends, notwithstanding that the rescue be made, the possession itself and the rent at all times continues in right of the Chapter; and if it shall be so intended, then the assise is maintainable, although there was no seisin had since the rescue; and thus it seems to me the Assise, etc.

Suliard, contra: As it seems to me, the Dean and Chapter resemble an Abbot and his Convent; and if an Abbot and his convent are disseised and then the Abbot is unfrocked or dies; there the Abbot, etc., shall be put to their writ of Entry *sur disseisin*; so it seems to me in this case.

Brian: This case is not like an Abbot or Prior: for as you say, they shall be put to their writ of Entry, etc. For if an Abbot be disseized and die, the Abbot is put to his writ of Entry *de quibus*; but if a Dean and Chapter are disseised, and the Dean dies and another is chosen, the Dean and Chapter shall not (?) have assise; and the reason is because the Dean and Chapter are a single body, and although the Dean is dead, yet the Chapter are persons able to sue, etc., and so is not the convent, etc. And so it is with a Mayor and Commonalty, although the Mayor dies pending any action, yet the writ shall not abate; and so with a Dean, etc. Also, if a Dean makes a feoffment of the Chapter land, that is a disseisin of the Dean and Chapter, and they join in assise; and the reason is because the Dean and Chapter are a body, and nothing done by either of them shall prejudice the Chapter; for, if the Dean, in the name of the Chapter, wishes to command any one to demand a rent, that commandment is not good. And when the Dean himself wishes to demand rent in the name of the Dean and Chapter, it is good; for he should have a command under the seal of the Chapter, or otherwise it is not good; and so it is with a Mayor and Commonalty. But with an Abbot and Convent, the law is entirely different; for if an Abbot makes a feoffment, the successor shall be put to his writ of *Sine assensu Capituli*. And so, therefore, it seems to me that there cannot be disseisin of the Dean, unless there be disseisin of the Chapter. Therefore the right at all times continues; therefore, notwithstanding the rescue, the Dean and Chapter are in possession, therefore of this disseisin they have good cause of assise and the plea is not good. And so was the opinion, etc.

The case is quoted entire, so that it may clearly be seen that the question involved was merely a technicality of ecclesiastical law. The tenant of a Dean and Chapter had made rescue of a distress, the Dean died, and the successor, with the Chapter, brought an assise of *Novel Disseisin*. The defendant objected that the writ should be of entry *de quibus*, as in case of an Abbot or Prior, but the Court held otherwise, because the Dean and Chapter were *un corps entier*, and the disseisin of the Dean was a disseisin of the Chapter, upon which the successor of the deceased and disseised Dean, together with the Chapter, might bring his assise. Fitzherbert, F. N. B. Assise of Novel Disseisin (179) C. & H., and the supplement to Booth on Real Actions, contain the old learning upon this writ; and the cognate writ of entry *de quibus*, is explained in F. N. B. and Booth on Real Actions (174). Says Fitzherbert—

“E. And an Abbot, or a Prior, or Mr. of an hospital, or a Bishop, shall have a writ *de quibus* upon a disseisin of their predecessors of lands, tenements or rent, and the writ shall be such,” etc.

Cases of this kind are very frequent in the Year Books. See Bro. Abr. Trespass, pl. 341, an action by the successor of an Abbot for waste; and pl. 380, an action by the successor of an Abbot for ravishment of ward.

So far as the writer has been able to find in the Abridgments and Year Books, these religious corporations appear to have been subject to actions of nuisance, waste and trespass, according to ordinary rules. Thus we find, Mich. 48 E. III 27, an assise of nuisance against the Abbot of Everwike, for diverting the course of a stream, *ad nocumentum*, etc. Trin. 40 E. III 31, pl. 12, the Abbot of Dirland brought trespass against the Prior of S. for trampling down his pasture. Mich. 46 E. III 23, Robert, Dean of St. Peters, and the Chapter, and John Weliot clericus, were sued by the Abbot of Belfast, because they *injuste et sine judicio levaverunt quendam gurgitem ad nocumentum*, etc. In Bro. Abr. Nuisance, pl. 5, Nota, per KNYVET, Chief Justice, a Prior was adjudged responsible for the repair of a bridge. Fitzh. Abr. Waste, pl. 75, an action against an Abbot for waste committed by his predecessor. Fitzh. Nonabilitie 21, Assise of rent against the Abbot of Westminster. In 49 E. III 25, waste was brought against the Prior

of Bekeherwein, for waste committed by a monk. It was there said—

“ If a monk of his house commits waste during the Abbot's life, I say that the Abbot shall be charged, because it shall be considered the act of the Abbot himself.”

The modern case relied upon by the Court is *The Feoffees of Heriot's Hospital v. Ross* (1846), 12 Cl. & F. 507, the facts of which were as follows : In 1623, Heriot bequeathed his residuary estate to trustees to be employed for the “ maintenance, relief, bringing up and education of so many poor fatherless boys, freemen's sons of the town, as the means I give shall amount and come to.” John Ross, the son of a deceased freeman of Edinburgh, poor and qualified for admission, under certain rules established for the government of the hospital by Dr. Balcanquill, a friend of the testator, in accordance with a provision in his will, was refused admission, and brought suit against the trustees, praying that they should be decreed to pay damages to him for their refusal to admit him to the hospital. It was alleged that the trustees had admitted, in preference to the applicant, certain boys who were not fatherless, and consequently not entitled under Heriot's will. The Scotch Court awarded the plaintiff reparation or damages, but their finding was reversed by the House of Lords, to which the trustees appealed. By the time the case was heard on appeal, however, the boy Ross had passed the age at which he was eligible, viz : ten, so that his claim was for damages solely.

In the House of Lords, it was held, on the authority of *Duncan v. Findlater* (1839), 6 Cl. & F. 894, that the trustees (who were sued in their corporate capacity) were not liable, and the reasoning of the Court is set forth quite fully in the quotations contained in the opinion in the Pennsylvania case. It is submitted that the argument shows a misapprehension of the question. Said Lord COTTENHAM—

“ To give damages out of a trust fund, would not be to apply it to those objects which the author of the fund had in view, but would be to divert it to a completely different purpose.”

Not so. The object which Heriot had in view, was to provide for the education of boys just like John Ross, and the boy's complaint was that his share of the fund was not applied

to that very object. He was admittedly wronged in being deprived of a participation in the fund. The donor intended that he should participate in it. To give him damages from the fund, therefore, would fulfill the intention of the donor, rather than defeat it; which intention was that John Ross, or boys like him, should be benefited by his money. Again, Lord CAMPBELL said (p. 518)—

“The trustees would, in that case, be indemnified against the consequences of their own misconduct.”

It is hard to see whence this idea came. Clearly the truth is just the other way. The trustees would be liable to make good to the charity the loss occasioned by their misconduct, and besides might be removed from their office. But Lord Campbell's remark is as inconsequent as if one should say that an ordinary servant is indemnified against his own misconduct by the rule of *Respondeat superior*.

Again, a mere breach of trust by a trustee is not a tort at all. It is a wrong, but not a wrong which could be redressed in a common law action. Professor Pollock, in his *Law of Torts*, p. 3 (than which no better authority can be found), brings out this distinction very clearly and expressly cites this as an example of what is *not* a tort. It is one thing to say that trust funds shall not be liable for the damages caused by such a breach of the terms of the trust, and another to say that the same funds shall not pay the damages caused by the tort of the trustees.

Adopting the expressions of opinion contained in this case, however, the Pennsylvania Justice adds, that there is not space to discuss the long line of cases in England, and this country, in which the above principle is sustained, it being sufficient to refer to a few of them by name. No other English cases are cited and the writer can find none. The Court, however, cite numerous American cases, but without showing how they support the doctrine.

Riddle v. Proprietors of Locks (1810), 7 Mass. 187, adds nothing. There, the proprietors of a canal, bound by their charter to construct a canal of a certain width and character, were held liable for damages sustained by the owner of a raft. So far

from applying *Russel v. Men of Devon* (1788), 2 T. R. 667, it distinguishes that case, on the ground that the rule there laid down, does not apply to "regular corporations which have, or are supposed to have, a corporate fund."

In *McDonald v. Massachusetts General Hospital* (1876), 120 Mass. 432, a house pupil assumed to set a fractured leg, contrary to the wish of the plaintiff, who wished and asked to be permitted to await the return of the resident physician, then temporarily absent, and the point of the case (irrespective of *dicta*) was that the defendant was not liable for the unauthorized assumption of the student to act as a surgeon. The *opinion* of the Court does, indeed, support the position maintained.

Shelbourne v. Yuba County (1862), 21 Cal. 113, held that a county was not liable for the negligence of its physician at the county hospital, because it was merely a *quasi* corporation, acting under a public law for the public benefit.

Brown v. Inhabitants of Vinalhaven (1876), 65 Me. 402, following the Massachusetts law on the subject of unincorporated municipalities, held that the "town," as a *quasi* corporation, was not liable, except by express statutory provisions. *Mitchell v. City of Rockland* (1860), 52 Me. 118; *Richmond v. Long* (1867), 17 Grat. (Va.) 375; *Murtaugh v. St. Louis* (1869), 44 Mo. 479; *Hamilton County v. Mighels* (1857), 7 Ohio St. 109; and *Maximilian v. Mayor* (1875), 62 N. Y. 160, are to the same effect. *Ogg v. Lansing* (1872), 35 Iowa 495, held that a city, exercising legislative functions, was not liable for the negligence of its officers, while *Patterson v. Pennsylvania Reform School* (1880), 92 Pa. 229, it is submitted, involved an entirely different question.

From this review of the cases cited by the Pennsylvania Court, it will be seen that, so far as authority goes, the judgment depends upon *Hcriot's Hospital v. Ross* (1846), 12 Cl. & F. 507, and this, upon examination, is found to rely upon *Duncan v. Findlater* (1839), 6 Cl. & F. 894, which was an action against the trustees of a turnpike road, for damages caused by negligence in the repaving of the road. The statute under which the trustees were appointed, provided that the tolls collected should be applied to making, repairing and im-

proving the roads and bridges, and the extinguishment of the debt, and to no other purpose whatsoever. Lord COTTENHAM said—

“It is impossible to suppose that the framers of this statute contemplated that any part of this fund would be appropriated for the purpose of affording compensation for any act of the persons who might be employed under the authority of the trustees.”

Which argument, upon the construction of a statute and the intention of its framers, he afterwards applied in the case of *Heriot's Hospital*, to what is certainly very different, to wit: the intention of the founder of a trust. The accident seemed to have been caused by the default of an independent contractor, and the case might well have been decided on that ground, and in fact nothing more was decided, according to Mr. Justice BLACKBURN; *Mersey Dock Trustees v. Gibbs* (1886), L. R. 1 H. L. 117. The principle enunciated by the Court was, indeed, that the trustees of the turnpike road having been incorporated for a public purpose, were not subject to the rule of *Respondeat superior*, but the cases cited by the Court seem generally, however, to involve the question of the personal liability of the trustees. The question of the liability of municipal, or *quasi* municipal corporations, in such cases is entirely too complicated to be decided off-hand. There is probably no subject more confused by contrary decisions, as may be seen by a reference to Dillon on Municipal Corporations, Chapter XXIII. and § 983. As concerns the case of *Boyd v. Insurance Patrol*, however, it is unnecessary to discuss this branch of the subject, as both the *Heriot's Hospital* case and the *Insurance Patrol* case were rested on what Mr. Justice PAXSON, in the latter, calls the “higher ground.”

Nevertheless, it is worth while to note the later criticism of the *dictum* favoring this higher ground, contained in *Duncan v. Findlater*. It is styled by Lord WESTBURY in *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 126, a misapprehension which would lead to very mischievous consequences.

“It is by no means true,” it was said, “that a court of equity is able to protect the property of beneficiaries against the acts of trustees. If trustees alienate property for valuable consideration to a person who pays that consideration without notice of the trust, the interest of the beneficiaries suffers from that act; and it would be a very unreasonable and a very mischievous thing, if, in the case of corporations

dealing with the public, or with individuals, such corporations should, by any conduct in respect to property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting for a remedy against the body doing or authorizing these acts, and should be driven to seek a remedy against the individual corporators, whose decision or order in the name of the corporation may have led to the mischief complained of. It is much more reasonable in such case, that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint and his title to relief against the individual corporators who have wrongfully used the name of the corporation."

III. RESPONDEAT SUPERIOR.

We start with the rule of *Respondeat superior*, in accordance with which a charity is liable for its servants' torts, unless it can show itself to be an exception. Take the case of an action brought against a free hospital for the negligence or malpractice of its surgeon. It must be admitted, aside from adjudged cases, that three out of every four laymen would at first blush to think that the action should not lie, if due care had been exercised in the selection of the physician. At least four reasons would be given.

First. That the hospital being free, the patient pays nothing for medical attendance, and, therefore, for lack of consideration, should recover no damages for his injury. The error here, it seems to me, lies in applying theories of contract to a case of tort. The doctrine of consideration has nothing to do with it. He who undertakes to do a thing, makes care and skill his duty, and is liable for default. From the time of *Coggs v. Bernard*, it has been clear law that an action for damages lies for negligence in the execution of a gratuitous undertaking. If a consideration is requisite, it may be implied from "the trust reposed in the defendant, to which he has concurred in his assumption," or to apply more recent theories of the doctrine of consideration, in the case supposed, though the patient pays no money, yet he pays with his leg.

Second. That the charity has no funds wherewith to pay the damages. This argument was used in the *Patrol* case, and appears to have originated in *Russell v. Men of Devon* (1788), 2 T. R. 667, a case of an action by an individual against the inhabitants of a county—a *quasi* corporation. As applied to a corporation like the *Patrol* company, it has no application.

No man can plead his poverty or insolvency in bar of an action, and corporations cannot do so; yet the argument amounts to this. The question, however, has been decided in more than one case in England, adversely to such defence, and doubtless American authority may be found: See *Livingston v. Lurgan Union* (1868), 1. R. 2 C. L. 202; *Southampton and Itchin Bridge v. Southampton* (1858), 8 E. & B. 801; *Kendall v. King* (1856), 17 C. B. 483.

Third. That the funds of the charity are affected with a trust for the benefit of the objects designated by the donor or contributors, which is the principal ground of the decision in *Heriot's Hospital v. Ross* and *The Insurance Patrol v. Boyd*. But, carry that argument out to its logical result, and it should apply to the contracts of the trustees as well, as pointed out in *Mersey Docks v. Gibbs*. I suppose that if the trustees of a hospital, in building a new ward, should deprive the adjoining land of its lateral support, or damage a party wall, the owner thus injured, could recover damages from the hospital as in ordinary cases.

Moreover, the intention of the donor should not be considered an all-sufficient reason, and prevail to an unlimited extent. Undoubtedly the founder of a charity does not direct the payment of damages caused by the torts of its managers. He does not contemplate that such cases will arise, and naturally does not make provision for them. To say, however, that his bare intention, or failure to make such provision, shall subvert the ordinary rules of law, carries the doctrine of trusts far beyond the law of spendthrift trusts, as it exists even in Pennsylvania: See Gray on Restraints on Alienation, § 212. In spite of the remark of the learned Justice, 120 Pa. 649, it is hard to think that a trust is invested with such "sacredness." Property, in whosoever hands it may be, must be subject to the ordinary liabilities, unless expressly excepted by statute.

A fourth reason is sentimental, rather than legal: that a charity endeavoring to do good, founded by philanthropy and maintained for the well-being of the community, is not liable for failure to accomplish its end. This involves the question, Does intention to do good excuse doing harm? Let us discard the doctrine of the "criminalists" on the one hand, that lia-

bility is based upon personal fault, and, on the other, the theory that a man acts at his peril. Let us adopt the more scientific rule, that the liability for unintended harm, is determined by what would be blameworthy in the average man. (See Holmes on Common Law; Lectures III and IV.) The decision of the question must be left to the jury, remembering that liability to an action does not necessarily import wrong-doing, and that negligence, "the absence of care according to the circumstances," signifies, in the commission of an act, such clumsiness or unskillfulness, that injury is caused to another.

The good Samaritan, when he found the man wounded by the thieves, poured oil and wine into his wounds and bound them up. Suppose he had, with the best intentions, but without the requisite knowledge and skill, amputated a limb which was but slightly injured and needed only nature's cure, the patient might well have prayed to be saved from his friends. Such actions are not often brought, because, in the opinion of mankind at large, they would savor of ingratitude, and *noblesse oblige*; this does not prove that they cannot be brought, and while the argument is proper enough for the jury, the defendant cannot call for binding instructions.

Upon the other hand, our hospital opens its doors to the sick and injured, and invites them to come in. It does not guarantee health and recovery, but it does promise careful and skillful attendance. It places its surgeons by its beds and puts in their hands the power to do good or evil. A patient goes to the *hospital*, and not to Doctor A. or Surgeon B., whose name, perhaps, he does not know. But he does know the hospital, and has a right to expect to receive intelligent assistance. It is no answer for the managers to say that they have exercised due care in selecting their physicians, for such a plea would abolish the rule of *Respondeat superior* in all cases: Holmes on Common Law, p. 6. The negligent physician is liable over to the hospital for the damages incurred through his default, and it is more reasonable to allow the injured plaintiff his action against the master, than to restrict him to his remedy against the servant.

IV. AUTHORITIES OPPOSED TO THE PENNSYLVANIA CASE.

In *Gibbs v. Trustees of the Liverpool Docks* (1858), 3 H. & N. 164, the plaintiffs were the owners of the cargo of a vessel which arrived in Liverpool, where the defendants were the proprietors of a dock constructed under the authority of an Act of Parliament. The defendants collected from vessels using the docks, certain tolls, which they were bound to apply to the maintenance of the dock, so as to keep it safe for vessels entering the same. The declaration averred that the defendants had funds in their hands, received from tolls, sufficient for the maintenance of the docks in good repair, but that the defendants did not take reasonable care, and negligently, with knowledge of the fact, permitted the entrance to the dock to become obstructed by mud, upon which the plaintiffs' vessel struck, and was thereby, with its cargo, damaged. Said COLERIDGE, J., in the Exchequer Chamber—

"The case of *Parnaby v. Lancaster Canal Co.* (1839), 11 A. & E. 223, establishes that the defendants would have been responsible under such circumstances, if they had had a beneficial interest in the tolls when received, and we do not think the principle of that decision inapplicable, because the defendants, in the present case, received the tolls as trustees."

The judgment of the Exchequer (1856), 1 H. & N. 439, was accordingly reversed, and the demurrer to the declaration overruled. Upon the trial, the jury found a verdict in favor of the plaintiffs.

About the same time, a similar action was brought by Penhallow, the owner of the vessel, against The Mersey Docks and Harbor Board, formerly styled the Liverpool Docks, and at the trial the jury were charged that, if the defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, the verdict should be for the plaintiffs. To this charge the defendants excepted, and upon a verdict in favor of the plaintiffs, the case was removed to the Exchequer Chamber, where the charge was sustained: (1861) 7 H. & N. 329. Both cases were then removed to the House of Lords (1864, 1866), and are reported in L. R. 1 H. L. 93. In delivering his judgment, which was founded upon *Parnaby v. Lancaster Canal Co.* (1839), 11 A. & E. 223, Lord Chancellor CRANWORTH said—

"The only difference between that case and those now standing for decision, is that here the appellants, in whom the docks are vested, do not collect tolls for their own profit, but merely as trustees for the benefit of the public. I do not, however, think that this makes any difference, in principle, in respect to their liability. It would be a strange distinction to persons coming with ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not."

Lord WENSLEYDALE, it is true, considered the question as ruled by the prior decision of the Lords in *Jones v. Mersey Dock Trustees* (1865), 11 H. L. C. 443, in which it was held that the same defendants were liable to be rated as occupiers, though their occupation of the docks was not for private benefit, and that therefore their liability for negligence, as their responsibility for taxes, was that of private, and not public corporations. Lord WESTBURY disagreed with Lord WENSLEYDALE upon this point, and decided the case upon general principles, in opposition to the *dicta* in *Duncan v. Findlater*, and such was the opinion of the Judges who were summoned. Professor Pollock, in his work on Torts, page 51, gives the result of this case in the following words—

"Where bodies of persons, incorporated or not, are intrusted with the management and maintenance of works or the performance of duties of a public nature, they are in their corporate or *quasi* corporate capacity responsible for the proper conduct of their undertakings no less than if they were private owners; and this whether they derive any profit from the undertaking or not."

The Irish Exchequer Chamber reached the same conclusion in *Levingston v. Lurgan Union* (1868), 1 R. 2 C. L. 202.

In *Glavin v. Rhode Island Hospital* (1879), 12 R. I. 411, the plaintiff, who had been a patient in a hospital administered as a charity, brought an action on the case to recover damages for unskillful and negligent surgical treatment. The plaintiff, while at the hospital, paid eight dollars a week for his board, washing, etc., but the surgical services were rendered free. The Court directed a verdict for the defendant, on the ground that the hospital, being the dispenser of a public charity, and dependent for support upon voluntary contributions, was by public policy exempt from liability for the negligence of its physicians. The whole subject was fully discussed by DURFEE, C. J., who, after reviewing the English cases, said—

"Where there is duty, there is *prima facie* at least, liability for its neglect; and when a corporation, or *quasi* corporation, is created for certain purposes which cannot be executed without the exercise of care and skill, it becomes the duty of the corporation, or *quasi* corporation, to exercise such care and skill; and the fact that it acts gratuitously, and has no property of its own in which it is beneficially interested, will not exempt it from liability for any neglect of the duty, if it has funds or the capacity of acquiring funds for the purposes of its creation, which can be applied to the satisfaction of any judgment for damages recovered against it."

The Supreme Court therefore ordered a new trial.

Livingston v. Guardians of Lurgan Union (1868), I. R. 2 C. L. 202, was an action against the Poor Law Guardians of a Union, for injury caused to the plaintiff by making a sewer and discharging sewage from the workhouse into a stream to the use of which the plaintiff was entitled. The case of *Mersey Docks v. Gibbs* was followed, and supported, in an able discussion of the subject by the Irish Exchequer Chamber.

It is of course true, as noted by Mr. Justice PAXSON, that in the discussion of the ratability of the Mersey Docks Trustees as occupiers under the Act of Parliament (11 H. L. C. 465), the argument did not turn upon the question whether the docks were charities or not. Those cases were cited only by way of analogy. Neither are the Dock cases here cited as directly decisive of the question chiefly involved in the case of the Fire Insurance Patrol. The Dock cases, and similar decisions, do show, however, that the ground of decision taken in *Duncan v. Findlater*, *Heriot's Hospital v. Ross* and *Boyd v. Insurance Patrol* are incorrect, or at least inconsistent with principle.

V. LIABILITY OF A CHARITABLE CORPORATION.

To sum up the result upon the main question, Is a charitable corporation liable for the torts of its servants? We find it said to be answered in the negative by one English case, *Heriot's Hospital v. Ross*, upon grounds untenable under the English decisions; and by a Massachusetts case, *McDonald v. Massachusetts Hospital* (1876), 120 Mass. 432, which may indeed be easily distinguished, as above stated; by a Maryland case, *Perry v. House of Refuge* (1884), 63 Md. 20, following *Heriot's Hospital v. Ross*; while an affirmative answer is given in the carefully considered case of *Glavin v. Rhode Island Hospital* (1879), 12 R. I. 411, and it is submitted that this view is supported

by general principles of law. At all events, the question can scarcely be considered as settled in Pennsylvania by the Insurance Patrol case, which may more safely be rested upon other grounds.

Upon the second branch of the case it is conceived little need be said. The Court laid it down that the true test of a charity is the purpose; that is, the destination to which the money is to be applied, not the motive of the donor. It may be that Mr. Binney's celebrated phrase, "free from the stain or taint of every consideration that is personal, private or selfish," is rhetorical, rather than exact, and it is true that the Courts have frequently recognized as charities, foundations established "to immortalize their founders," but never before has an institution, founded and maintained for the express purpose of benefiting its contributors pecuniarily, been held to be a charity.

The evidence quoted above showed most conclusively that these fire insurance companies paid their money to support the "Fire Insurance Patrol," for the express purpose of reducing their losses by fire, and that they derived substantial benefit from its operation. The learned Judge presiding at the trial, ALLISON, P. J., well charged—

"It seems to me, that whenever a corporation claiming to be a charity, puts itself in the position before the law, of saying, that however commendable the saving of life and property may be, yet that the great object of its existence is to make money for some persons, and that they are to receive a profit and benefit growing out of the operations of that corporation, whether it be directly or indirectly, that moment all claim to its right as a charity, such as the law may possibly protect, passes out of the case."

"It would be idle to say," Mr. Justice PAXSON admits, "that the insurance companies do not expect to diminish their losses, by their support of the Insurance Patrol. But has the private citizen, who contributes to a fire company, any higher motive?"

The distinction and the true test is a very simple and obvious one. In the language of the Court in *Donohugh's Appeal* (1878), 86 Pa. 306, is there "some mixture of private or individual gain," or, in other words, is there an expectation of direct pecuniary profit?

Indeed, in the very recent case of *Philadelphia v. Women's Christian Association* (1889), 125 Pa. 572, *Donohugh's Appeal*

was approved, and the present Chief Justice stated the rule almost in the very words used above, that an institution claiming exemption from taxation, as a public charity, should be "free from any element of private or corporate gain."

How any one can say that this element is not to be found in the Fire Insurance Patrol Company, is difficult to perceive.

JOHN MARSHALL GEST.

Philadelphia.

RECENT AMERICAN DECISIONS.

Supreme Court of Indiana.

STATE EX REL. WORRAL *v.* PEELE.

The Legislature possesses only such power as the people have delegated to it by the Constitution. A written Constitution is a limitation upon the power of government in the hands of the Legislature.

The Legislature has no power to create a general State office and fill it by election, unless especially empowered so to do by the Constitution.

A clause in the Constitution, that "All officers, whose appointments are not provided for in this Constitution, shall be chosen in such manner as now is or hereafter may be prescribed by law," does not of itself empower the Legislature to elect or appoint a general State officer.

The right to fill vacancies by appointment in all State offices of a general character, is vested in the Governor.

The electors of the State have a right, of which they cannot be deprived, to fill all State offices of a general character, by election.

The attempt of the Legislature to fill an office newly created, by election, being void, the Governor may disregard such attempt and fill the vacancy by appointment.

Harris, Beveridge and Michener, Attorney-General, for appellant.

McCullough & Harlan for appellee.

OLDS, J., November 7, 1889. The relator filed his information to obtain possession of the office of Chief of the Indiana Bureau of Statistics, to which office he claimed to have been duly appointed by the Governor of the State, and for the removal of the defendant, William A. Peelle, Jr., who, it is alleged, had usurped and illegally continued to hold such office. The defendant demurred to the information in the Court below, stating two causes of demurrer: *First*, that the complainant does not state facts sufficient to constitute a cause of action; *Second*, that the plaintiff has not legal capacity to sue.

The Court sustained the demurrer, to which ruling the plaintiff excepted at the time, and elected to stand on the information as filed, whereupon the Court rendered judgment for the defendant. From this judgment the plaintiff appeals, and assigns as error the ruling of the Court in sustaining the demurrer to the information.

It is contended by counsel for the appellee that notwithstanding the relator may be entitled to the office, and the defendant has usurped and continues to illegally hold it, the information does not state facts sufficient to entitle the relator to the relief asked, and that the demurrer was rightfully sustained. This question we have considered, and think the information not subject to the objections urged to it, and that it is sufficient. It alleges facts showing the date of appellant's appointment, that there was at the time a vacancy in the office, that the relator was duly appointed by the Governor of the State, and that he is eligible to the office, that the defendant had usurped and illegally held it, and states that he made a demand for the possession of the office.

This brings us to the consideration of the chief and leading questions in the case. The Legislature of the State in 1879 passed an Act creating a Department of Statistics, and the first section of the Act, R. S. 1881, Section 5717, declared the purpose of the Act to be "for the collection and dissemination of information hereinafter provided, by annual reports made to the Governor and Legislature of the State." The second section provided for the appointment of a chief, and is as follows—

"The Governor is hereby authorized to appoint, as soon after the passage of this act as convenient, and thereafter, biennially, some suitable person to act as chief, who shall have power to employ such assistants as he may deem necessary, and said officer and assistants shall constitute the Indiana Bureau of Statistics, with headquarters to be furnished by the State."

Section Three prescribed the duties of the bureau as follows—

"The duties of said bureau shall be to collect, systematize, tabulate and present, in annual reports, as hereinafter provided, statistical information and details relating to agricultural, manufacturing, mining, commerce, education, labor, social and sanitary conditions, vital statistics, marriages and deaths, and to the permanent prosperity of the productive industry of the people of the State."

Section Four made it the duty of all persons, officers and corporations to give and furnish information on blanks and to answer to questions relating to the duties of the bureau. The act provided for the salary of the chief, and prescribed penalties for failures to give information.

By an Act passed in 1883 (Elliot Sup., Sec. 1852), Section Two of the Act of 1879 was amended, and the amended section made it the duty of the two houses of the General Assembly, in joint convention, to select at its regular biennial sessions its chief, and, in case of vacancy in the office by death, resignation or dismissal, the Governor should supply the vacancy by appointment, and provided that the first election of such chief should be held on the taking effect of the Act.

In 1889, the Legislature passed an additional Act relating to such Bureau of Statistics, by which they imposed additional duties on the chief of the bureau. Section One provided that, in addition to the other duties now imposed by law on the Chief of the Indiana Bureau of Statistics, he shall collect, compile and systematize statistics with reference to the subject of labor, as to social, educational, industrial and general conditions, wages and treatment of all classes of our working people, to the end that the effect of the same may be shown, and shall report to the Legislature, in convenient form, the results of his investigation. Section Two provided that the duties of such bureau shall be to collect, in the manner hereinafter provided, assort, systematize, print and present biennial reports to the Legislature, of statistical details relating to all departments of labor in this State, including the penal institutions thereof, particularly concerning the hours of labor and mechanics employed, the number of apprentices in each trade, with the nativity of such laborers, mechanics and apprentices, wages earned, savings from the same, the culture, moral and mental, with age and sex of persons employed, the number and character of accidents, the sanitary condition of institutions where labor is employed, as well as the influence of the several kinds of labor and the use of intoxicating liquors upon the health and mental condition of the laborers, the restrictions, if any, put upon apprentices when indentured, the

proportion of married laborers and mechanics who live in rented houses, with the average annual rental of the same, the average members of the families of married laborers and mechanics, the value of property owned by laborers or mechanics, if foreign-born, upon their arrival in this country, and the length of time they have resided here, together with all other matter pertaining to the subject. Section Three authorized the chief and deputy to examine witnesses, and gave them power to compel persons to produce and give the information desired. Section Four prescribed penalties for a refusal to furnish information and answer questions asked by the chief and his deputy. Section Five authorized the employment of a deputy by the chief at a salary of \$1,000 per annum, and the employment of other assistants. Section Six appropriated \$5,000 additional per annum to carry out the provisions of the Act. Section Seven allowed the chief \$600 additional salary, making in all \$1,800 per annum. By Section Eight it is made the duty of the chief to transmit immediately on publication, one copy of the biennial report of the bureau to each county and State officer in Indiana.

It is contended on the part of the appellant that the Chief of the Indiana Bureau of Statistics is a State officer, and that the law is unconstitutional in so far as it provides for the election of such officer by the General Assembly, and that the election held by the General Assembly, at which the appellee was elected, was illegal and void and gave the appellee no title to the office, and that there was a vacancy in such office at the time the relator was appointed, which the Governor had the right to fill by appointment, which he did by the appointment of the relator, Worral. On the other hand, it is contended by the appellee that it is a legislative office, which the General Assembly had a right to fill by election, as prescribed by the law, and that although it may not be a legislative office, and is, in fact, a State office, yet the General Assembly had the right to fill such office by an election as provided for by the Act of 1883; that the Legislature has the right to create a State office and prescribe by law that the General Assembly shall elect such officer.

It is admitted, and must be, that the Legislature of the State

may exercise appointing power and select officers to fill the various offices which are peculiarly related to and connected with the exercise of its Constitutional functions and such as are necessary for it to appoint to maintain its independent existence, and this we think the limit of the appointing power of the Legislature, unless additional power has been given by the express provisions of the Constitution, or acquired by construction under the rules of practical exposition. We have therefore set forth in detail the provisions of the various acts relating to the object of creating the Indiana Bureau of Statistics, and the duties and powers of the chief of such bureau, and from such provisions we are to determine whether or not such office is one which the Legislature has the right to elect.

It is contended by counsel for appellee that the object of the bureau is for the purpose of having collected and systematized such facts pertaining to labor and kindred subjects as might become important to direct the General Assembly in enacting wise legislation, and to that end they may require that the chief of such bureau shall make a full and complete detailed report of his investigations to them, and that he shall make such recommendations with reference thereto as he may deem proper. We cannot agree with this theory. The first section of the Act of 1879 provides that the chief shall report both to the Governor and the Legislature, and that section has not been amended or repealed, and is still in force. The Act of 1889 makes it the duty of the chief to send one copy of his report, as soon as printed, to each county and State officer. If we are to limit the object and purpose of the bureau to furnishing information to those to whom the chief is to report or furnish copies of the report; the object is as much to furnish information for the Governor and other individual State and county officers of the State as to furnish information to the Legislature, for they are each and all to be furnished with a report and the information it contains.

We think the object and purpose of creating the bureau and putting an officer at its head is much broader than that contended for by counsel for appellee. It is to gather and systematize statistical information and details relating to agriculture, manufacturing, mining, commerce, education, labor, so-

cial and sanitary conditions, vital statistics, marriages and deaths, and the prosperity and productive industry of the people of the State; that all the people of the State may know the facts gathered relating to the resources of the State, the condition of its laborers, its social and sanitary conditions, and as to the education and prosperity of its citizens, for the good of the people of the State, and the development of its industries and good of its citizens. To this end the reports are required to be distributed so as to be accessible to all, and not only that it may be known, and the information furnished to every citizen of the State, but that the people of other States and the world may know in reference to the products of the State, and of our mining, manufacturing and educational interests, the condition of our laborers, and our social and sanitary conditions. To this end it is provided for a liberal distribution of the reports of the chief, that one may be placed in the hands of every State and county officer. When the people are put in possession of this information, the legislators, who are of the people, elected by and come from the people at frequent intervals, are possessed of this information, and prepared to direct wise legislation. When all the people are possessed of this information, it is far better than if but the legislators were informed of it. If the information disclosed such a state of facts as that suggested, and required legislation, it would provoke discussion as to the proper legislation to remedy any evil which might exist within the State. Remedies would be suggested and legislators selected whose views corresponded with the views of the majority, and thus the will of the majority of the people of the State would be expressed by a law prescribing a remedy for the evil, if one existed, or the betterment of the people, or development of the industries of the State.

Fortunately, in passing upon this question, we are not left to our own views alone in determining the question as to whether this is a legislative office or not, with the Legislature claiming it as such and the Governor denying that it is, for we have evidence in the law itself that the Legislature which enacted the first Act upon the subject creating the bureau, and providing for a chief, did not regard it as a legislative office. The Act of 1879 provided that the Governor should appoint

the chief; therefore, we think it must be conceded that the Legislature creating the office did not regard it as a legislative office. If it had been so regarded by that Legislature it would have elected the officer. Certainly the Legislative Department would not call upon another department of the State Government to appoint or elect an officer that was within its prerogative to elect. Indeed, it seems to us that there can be no reasonable doubt on the question of the nature of the office. The information to be gathered is for the benefit of the whole people of the State, the duties of the office relate to and affect all the people of the State; the officer is given power to inquire into the business, the finances and social relations of all the people; he is given almost unlimited power to inquire into nearly all matters affecting the interest of the people, and may compel all to answer his questions and furnish the information desired; the officer's salary is paid out of the general funds of the State, and appropriations are made from the general funds to pay the expense of gathering the information. The officer is no way connected with the exercise of legislative functions; nor is his appointment necessary for the purpose of the Legislature in maintaining independent existence; nor has the Legislature acquired the right to appoint such officer by a construction of the Constitution, under the rule of practical exposition. In view of the object of the law and the nature of the office, it is unquestionably a State office, and we find upon examination of the laws of other States, that offices of this character are not regarded by the Legislatures of other States as in any sense legislative offices coming within the prerogative of the Legislature to elect the officers.

Having reached this conclusion, the next question for determination is the right of the Legislature under the Constitution to create a State office and fill it by the General Assembly electing the officer. This brings us to the consideration of the power of the General Assembly. This must be determined by some general principles. Judge Cooley, in his work on Constitutional Limitations, fifth edition, p. 37 (* 28), says—

“The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority.”

Story, in his work on the Constitution (Section 208), says—

“The State, by which we mean the people comprising the State, may divide its sovereign powers among various functionaries, and each, in the limited sense, would be sovereign in respect to the powers confided to each, and dependent in all other cases. Strictly speaking, in our republican form of government the absolute sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State not granted to any of its public functionaries, is in the people of the State.”

Judge Cooley, in the same work, on p. 47 (* 36), says—

“In considering State Constitutions, we must not commit the mistake of supposing that because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the power of the rulers, but they do not measure the rights of the governed.”

Again, on the same page (* 37), he says—

“It grants no rights to the people, but is the creature of their power—the instrument of their convenience.”

And, again, he says—

“A written Constitution is in every instance a limitation upon the powers of government in the hands of agents, for there never was a written republican Constitution which delegated to functionaries all the latent powers, which lie dormant in every nation, and are boundless in extent and incapable of definition.”

On page 208 of the same work Judge Cooley says—

“It does not follow, however, that in every case, the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important when they are in the nature of a general grant of power, and if the authority to do an act has not been granted by the sovereign to its representative it cannot be necessary to prohibit its being done.”

From these general and well-settled principles, laid down by Judges Cooley and Story, there logically flows, and they inevitably and conclusively establish the principle, that before the adoption of the Constitution and delegating power to the various departments of Government, there existed in the sovereign, the people of the State, all power, including the right to elect their own officers and rulers, and unless they delegated the power to create an office and elect the officer to some department of the State Government, that power still rests with the people, and the right to create the office is one thing and the right to elect the officer another; and if they have delegated power to create the office and not to elect the officer they (the

people) still have the right to elect. It is conceded that the right to create the office is delegated to the Legislature, and we need not consider that question. It is denied by the appellant that the General Assembly has the right to elect a State officer, and it is contended that the Governor has the right to appoint, at least when there is a vacancy, and that there was a vacancy in this case. On the other hand, it is contended by the appellee that the General Assembly has the right to elect a State officer, and that such power is conferred by Section 1, Article 15, of the State Constitution, which is as follows—

“All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is or hereafter may be prescribed by law.”

If such power is conferred at all, it is by this section, and we need not consider any other section or clause of the Constitution except such as is necessary to aid in the interpretation and construction of this section. A construction has been given to this section of the Constitution adversely to the theory of counsel for the appellee by decisions of this Court, in which a majority of the judges of the Court concurred: *The State ex rel. Jameson v. Denny, Mayor* (1889), 118 Ind. 382; *The City of Evansville v. The State ex rel. Blend et al.* (1889), Id. 426; *The State ex rel. Holt v. Denny, Mayor* (1889), Id. 449. It was held that giving the Legislature power to prescribe by law the manner of electing an officer does not confer the power to elect, and that there is a manifest distinction between providing the mode of doing a thing and doing a thing itself. These opinions are supported by the cases of the *State v. Kennon et al.* (1857), 7 Ohio St. 546, and *Jones v. Perry* (1836), 10 Yerg. (Tenn.) 59. The conclusions reached in these cases, we think, are correct, and give the proper construction to this section of the Constitution.

In this connection it is right to consider and determine what is the proper method of electing State officers, and who have the right to elect. It will be seen by reference to the old Constitution, that Representatives and Senators were elected by the people; also county and township officers, and the Governor and Lieutenant-Governor were elected by the people. All other State executive officers were elected by joint vote of both houses of the General Assembly, as were, also, the president

and judges of the Circuit Courts. The judges of the Supreme Court were appointed by the Governor, by and with the advice of the Senate, and they appointed the clerk of this Court. [R. S. 1843, pp. 97, 100, 101 and 102.] The Constitution also provided for the election of other officers by the vote of both houses.

By the new Constitution, the people changed the system of electing State officers, so as to re-vest in the people of the State at large the right to vote for and elect all administrative State officers prescribed for in the Constitution, and all the judges and clerk of the Supreme Court, and also provided for the election of the Superintendent of Public Instruction. In the first article and first section of the new Constitution, they claim that all power is inherent in the people. By Section 1, Article 3, they divide the powers of the Government in three separate departments—the Legislative, the Executive, including the Administrative, and the Judicial—and declare and say that no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided. By Section 1, Article 4, it is declared that the legislative authority of the State shall be vested in the General Assembly, which shall consist of a Senate and House of Representatives, and by Section 16, same article, it is declared that each house shall have all powers necessary for a branch of the legislative department of a free and independent State. This is all the general power granted to this department, and it is nowhere provided in what manner an officer, to fill an office created by law, shall be elected. The Constitution, by its terms, declares and vests the executive power of the State in the Governor, and it specifically authorizes the Governor to fill vacancies in State offices.

There is no provision in the Constitution declaring by whom a State officer shall be chosen or elected to a State office created by law. It seems manifest by the change made in the Constitution, taking away the power granted by the old Constitution to the General Assembly to elect State officers, the people retaining the power to elect all State officers created by the new Constitution, and granting to no department of Government the right to elect officers to fill the State offices which

might thereafter be created by law, that one of the principal objects in revising the Constitution was to take from the legislative and executive departments of the Government, all power to fill State offices by the appointment or election of such officers. In the Constitutional Debates, Vol. 2, p. 138, we find Mr. Holman, who was a member of the Convention, saying in a speech—

“It will be recollected that we do not intend to confer upon the Legislature the power of appointing. There may possibly be two or three officers, the appointment of which will be vested in the Legislature.”

And nowhere do we find the assertion controverted. We also find in the address issued by that Convention to the electors of the State, setting forth the changes proposed, a statement that—

“The Secretary of the State, Auditor of State and Treasurer of State, who were elected under the old Constitution by the Legislature, are now elected by the people.”

There is also the following statement in regard to the election of judges—

“The Supreme and Circuit Judges heretofore chosen, the former by appointment of the Governor, confirmed by the Senate, and the latter by joint vote of both houses, are, by the new Constitution, to be elected by the people,” and it is stated that “there is to be elected by the people a prosecuting attorney for each judicial circuit.”

It seems to be evident that if the office now under consideration had been created by the Constitution, the mode of electing the officer would have been declared to be by election by the people. No greater reasons exist why the Secretary of State or the Superintendent of Public Instruction should be elected by the people, than the Chief of the Bureau of Statistics. The conclusion we unhesitatingly reach is, that, under the new Constitution, which took effect November 1, 1851, the power to elect State officers whose duties are general, and such are the duties of the Chief of the Indiana Bureau of Statistics, remains with the people, and that the proper interpretation and construction to be given Section 1, Article 15, is that State officers shall be chosen by the electors of the State in such manner as may be prescribed by law, and that it is the duty of the Legislature, in creating a State officer, to fix the

term of the office and provide for the election of the officer by the people.

On examination we find the construction we have given the Constitution supported by the practical interpretation given to it until within a very recent date. Soon after the adoption of the Constitution, the office of Attorney-General was created, and it was provided by law that the officer should be elected by the electors of the State. True, the Act provided that the General Assembly should elect to fill the vacancy existing until an election by the people, but the General Assembly adjourned without holding an election and electing such officer, as the Act provided. The fair inference is, that on more mature deliberation, after the passage of the Act, they determined that they had no power to elect, and hence adjourned without doing so.

The Constitution provides that the General Assembly shall provide by law for the speedy publication of the decisions of the Supreme Court (Sec. 6, Art. 7), and immediately after the adoption of the Constitution, the Legislature created the office of Reporter of the Supreme Court, and provided for the election of the Reporter by the people. Likewise, district officers were created, Courts of Common Pleas were established, and the offices of judges of the Courts of Common Pleas and district prosecuting attorneys were created, and it was provided by law that the judges and prosecutors should be elected by the electors of the respective districts. Without setting out the various provisions in the Constitution vesting appointing power in the Governor of the State, it is our conclusion that the right to fill the vacancies in all such offices is vested in the Governor, the executive officer of the State.

It follows, therefore, that the Act of 1883, amending Section 2 of the Act of 1879, providing for the election of the Chief of the Indiana Bureau of Statistics by the General Assembly, is unconstitutional and void, and the Act of 1879, attempted to be amended, is still in force. Section 2 of the Act of 1879 provides that the Governor shall appoint the chief. In so far as it provides for the appointment by the Governor, it is simply declaratory of the Constitution and gives to the Governor no power that he did not possess by virtue of the Constitution, as

by it he held power to fill the vacancy until an election by the people, and the Legislature could give the Governor no greater authority, but this section is valid and operates to fix the tenure of the office. The force and effect of this section is to fix the tenure of the office at two years: American and English Encyclopedia, Vol. 3, p. 674, note 1; *Newland v. Marsh* (1857), 19 Ill. 376; *The Iowa Homestead Co. v. Webster County* (1866), 21 Iowa 221.

Though the law creating the office in question does not provide for the election of the officer by the people, and is silent on that subject, and there is no provision of the statute relating to and providing for the election of this particular officer, yet we think the law creates the office, and when created, the people have the right to elect the officer. It would seem that they would have that right, and might elect such officer at a general State election, even if there was no statute in force governing general elections that contemplated the election of such officer. The people cannot be deprived of the right to elect an officer, by the neglect or refusal of the Legislature to discharge its duty. But we are not called upon to decide that question, as the general election law clearly authorizes the election of such officers. Sec. 4678, Rev. Stat., 1881, reads as follows—

“A general election shall be held on the first Tuesday after the first Monday in November, in the year 1882, and biennially thereafter on the same day, at which election all existing vacancies in offices, and all offices, the terms of which will expire before the next general election thereafter, shall be filled, unless otherwise provided by law.”

This statute is broad enough, and it was intended to fill all offices which would become vacant before the next general election. The appointee of the Governor would hold until his successor was elected at the next general election after he was appointed and until his successor had qualified. There can be no question but that the people have the right to elect the Chief of the Bureau of Statistics at the general State elections provided for by Sec. 4678, Rev. Stat., 1881.

In determining the right of the people to elect a State officer and the appointing power of the Governor, we limit what we have said to offices of the nature and character of the one in question. There may be a class of officers, and probably is,

whose duties are not general, or relate to and are calculated to aid the Governor in the execution of the laws, or police officers whom the Governor would have the right to appoint, but in regard to his right to appoint such officers we decide nothing.

The conclusion we reach is, that the General Assembly had no power to elect the appellee to the office in question, and that such election was void; that the information alleges there was a vacancy in the office; that the appellee usurped the office and illegally held possession of it; that the Governor appointed the relator, and he was eligible and is entitled to the office. The Court below erred in sustaining the demurrer to the information.

The judgment is reversed at the costs of the appellee and the cause remanded to the Court below, with instructions to overrule the demurrer and for further proceedings in accordance with this opinion.

ELLIOTT and MITCHELL, JJ., dissent.

ELLIOTT, C. J.: I dissent from the prevailing opinion, for the reason that I believe the Legislature has power, and that, having power to do this, it has also the right to select the means and agencies which it deems necessary to carry into effect the law it has enacted, establishing that bureau. I have stated my views in the opinion in the case of *State v. Hyde* [decided November 7, 1889], and I do not deem it necessary to again discuss the question.

[The views of the dissenting judge can be understood from this quotation from his opinion in the case alluded to—"If the power to appoint is exclusively executive, the provisions of our Constitution expressly designating the cases in which the Governor may appoint are meaningless; but the words of an instrument of such a solemn and high nature as that of the organic law of a sovereign state cannot be disregarded. Courts have no right to treat them as dead and unmeaning; on the contrary each word is to be deemed one of life and strength. Giving force to the various provisions of the Consti-

tution which designate the cases in which the Governor may appoint to office, it must be held that he can appoint in no others; for it is a rudimental principle that the express mention of one thing implies the exclusion of all others. * * * If the Governor possesses the power of appointment as an inherent and exclusive attribute of executive power, then the many provisions—for there are many of them—designating the cases in which he may appoint, are vain and fruitless; since, if the power is an inherent executive element, these provisions are utterly meaningless."

At the same session of the Legislature at which the Act declared invalid in the principal opinion was passed, another Act was passed providing for cities having over fifty thousand inhabitants, a Board of Control, which should take charge of the streets and alleys of the cities, attend to their construction and repair, employ laborers, and attend to all necessary work connected therewith. The Common Council was required to provide funds for the expenses incurred by the Board. All other Boards of the kind were abolished. The Legislature, by a joint vote of a majority thereof, elected the members of the Board, and the Speaker of the House of Representatives and the Secretary of the Senate certified to the election, which certificate was declared to be "his authority to act as a member of such Board."

By a divided Court, this Act was declared unconstitutional, one of the grounds being that it involved the exercise of executive functions which were prohibited by the Constitution. "Generally," says the Court in the principal opinion in that case, "then, the appointment to an office is an executive function. It must be conceded, however, that it is not every appointment to office which involves the exercise of executive functions, as, for instance, the appointments made by judicial officers in the discharge of their official duties, or the appointments made by the General Assembly of officers necessary to enable it to properly discharge its duties as an independent legislative body, and the like. Such appointments by the several departments of the State Government are necessary to enable them to maintain their independent existence, and do not involve an encroachment upon the functions of any other branch. But the appointment to an office like the one involved here, where it is in no manner connected

with the discharge of legislative duties, we think involves the exercise of executive functions, and falls within the prohibition of Section 1, Article 3, of the Constitution [that is, that the powers of the Government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided].

Referring to the clause of the Constitution that "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law," the Court said—"This provision is evidently to be construed in the light of the laws in force at the time of its adoption. We think it would be impossible to ascertain its meaning in any other way. Other sections of the Constitution make provision for appointments by the Governor and for certain appointments by the General Assembly; but there was still a large number of officers created by law for whose appointment no provision had been made. In view of this fact, Section 1, Article 15, was inserted, providing that such officers should be appointed in such manner as then was, or as should thereafter be, prescribed by law. It is disclosed by an examination of the laws then in force, that the State librarian, State printer, Warden of the State prison at Jeffersonville, Commissioners of the Insane Asylum, and, perhaps, some other officers, for whose appointment no provision is made in the Constitution, were elected or appointed by joint ballot of the two Houses of the General Assembly. This, at the time of the adoption of the Constitution, was the manner prescribed by law for their appointment. This section provides that they shall continue to be so ap-

pointed, unless a different mode is prescribed by law. This construction harmonizes and gives force to all the provisions of the Constitution; while to wholly deny the General Assembly the power to make appointments, renders meaningless many words, phrases, and even whole sentences found in that instrument.

But the Court does not rest its opinion wholly upon the argument set out above. It proceeds to say—"We think it plain that the power to provide by law the *manner* or *mode* of making an appointment, does not include the power to make the appointment itself. As has been said, by Section 1, Article 15, the General Assembly has the right to appoint such officers as it had the right by the law in force at the time of its adoption to select, and by the terms of that section it also has the right to prescribe by law the manner in which officers, for whose appointment no provision is made in the Constitution, shall be appointed. What, then, is the limit of the legislative power to appoint to offices created by statute, or is there any limit to such power? If there is no limit, then the General Assembly may appoint all the officers created by statute, from the Attorney-General of the State down to the smallest township officer, for they are all the creatures of the statute. It may appoint the Board of County Commissioners, the Township Trustees, County Superintendents, and even Road Supervisors. It may create offices without limit and fill them with its own appointees. In the light of contemporaneous history of the Constitution, we do not think it will be seriously contended that the framers of that instrument intended to confer upon, or leave with, the General Assembly any such power. Where, then, is the limit? Whatever the limit may be, it is clear to us that it has no power to fill, by appointment, a local office like the one now under con-

sideration. As the right to prescribe by law the manner of appointing to a new office created by the Legislature does not carry with it the right to make such appointment, we know of no provision in the Constitution under which such right can reasonably be asserted. It is believed that this conclusion accords with the practical construction heretofore placed upon our Constitution:" *State ex rel. Jameson v. Denny* (1889), 118 Ind. 382.

Upon the same day the case just quoted from, was decided, the same Court also decided another case, involving the same principles. The same Legislature had appointed a Board for the control of the Police and Fire Departments of all cities having a population of 29,000 and over; and selected the members of the Board of Control. Not only was the appointment held invalid, but the entire Act, as in the previous case, on the ground that the Act deprived the cities embraced by it of local self-control: *City of Evansville v. State ex rel. Blend* (1889), 118 Ind. 426; *State ex rel. Holt v. Denny* (1889), 118 Id. 449 (involving the same questions).

The Constitution ordains that—"It shall be the duty of the General Assembly to provide, by law, for the support of institutions for the education of the deaf and dumb and of the blind, and also for the treatment of the insane." It was held that the Legislature had the right to make the appointments or the election of a Board of Trustees for such asylums, under the clause requiring it to provide for the support of such institutions. The judge who wrote the principal opinion thought that the clause that—"All officers, whose appointment is not otherwise provided for in this Constitution, shall be chosen in such manner as now is, or hereafter may be, prescribed by law"—controlled the case, and empowered the Legislature to elect or make the appointment; but

three of the judges, while concurring in the general result, apparently did not join in this part of the opinion, unless, possibly, it was ELLIOTT, J.

MITCHELL, J., said—"The Constitution provides specifically the manner in which certain officers are to be chosen. With reference to those not therein provided for, it directs that they shall be chosen as may be prescribed by law. That was the command of the people concerning a right inherent in them. If the original law of the State were silent concerning the method of selecting officers whose appointments were not otherwise provided for in the Constitution, it would then be necessary in each case to solve the question by construction, and by considering whether the duty or power in each particular case pertained to the legislative, the executive, or the judiciary. But, confining ourselves strictly to the case before the Court, we assert that the power to appoint agencies for the government of the hospital for the insane is not left to inference, but is expressly conferred upon the General Assembly. As we have already seen, the Constitution in the most explicit terms enjoins upon the General Assembly the duty to make provision by law for the support and maintenance of this institution. The solemn obligation thus imposed was laid directly upon that body, and it was left absolutely untrammelled as to the means and agencies which it should employ in executing the high command of the people.

"Accepting as correct the proposition that a law enacted in obedience to, and in execution of, the express command of the Constitution, which is not in palpable violation of some express Constitutional provision, is of as high sanction as though it were found in that instrument, and the further conclusion follows that the command of the Constitution, which enjoined upon the General As-

sembly the duty to provide by law for the support of the benevolent institutions, was equivalent to an express grant of authority to provide for the selection of all such agents or officers as that body should deem necessary to accomplish the duty imposed. Having been thus authorized, the manner of selecting the agencies for the government of these institutions, as provided by the Legislature, is not now open to question by any other department of the Government:" *Hovey v. State*, decided by the Supreme Court of Indiana, April 20, 1889.

A former case over the appointment of trustees for the same place, did not involve the Constitutional question presented in the latter case: *State ex rel. Carson v. Harrison* (1888), 113 Ind. 434; *Hovey v. State*, S. Ct. Ind., May 18, 1889.

At the same time the principal case was decided, the Court decided *State ex rel. Yancey v. Hyde*, involving the same question presented by the principal case. It was decided by a divided court, the same judges dissenting.

Another case in Indiana is somewhat illustrative of the general question, especially certain language used by the Court. In this case there was no division of opinion. The Legislature in 1889 created a Supreme Court Commission, and itself selected the Commissioners. The Supreme Court refused to acknowledge the validity of the Act.

In discussing the case, ELLIOTT, J. (who dissented in the principal case), said: "Counsel for the defendants refer us to the case of *Taylor v. Com.* (1830), 3 J. J. Marsh. (Ky.) 401, where it is held that the appointment to office is intrinsically an executive function. Other courts have asserted a like doctrine. Thus it was said in *State v. Barbour* (1885), 53 Conn. 76, that

'appointments to office, by whomsoever made, are intrinsically executive acts.' But if we were to accept this doctrine as correct, and give it full application, then it would completely destroy the claim of the defendants, for if the right to appoint can never be anything else than an executive act, the attempt of the Legislature to appoint the claimants was utterly abortive. But we do not understand the authorities to assert that the selection of officers is always an executive act. On the contrary, the authorities hold that, while the power is intrinsically executive, it may be exercised by a court, or by a legislative body, as an incidental power of an independent department of the government. No one would, we confidently assume, be so bold as to assert that the Legislature may not appoint officers connected with its duties and proceedings, and there is no more reason for denying the power to the courts than there is of denying it to the Legislature. The truth is that all independent departments have some appointing power as an incident of the principal power, for without it no department can be independent: *State v. Barbour, supra; Ackley's Case* (1856), 4 Abb. Pr. (N. Y.) 35. We are not here dealing with the general power to appoint, but we are dealing with a single phase of the general question, and we do no more than affirm that each department must have, and does have, some appointing power, and that where an appointment is essential to the proper exercise of a judicial duty, the court concerned has authority to make the appointment. If this be not true, then no court can appoint a guardian, an administrator, a receiver, a referee, an appraiser, or a commissioner. It is in truth impossible to conceive of the existence of an independent judicial department without the power to make some appointments. The denial of this incidental power is the annihilation of

judicial independence:" *State ex rel. Hovey v. Noble* (1889), 118 Ind. 350.

The Constitution of Indiana does not provide for the election of an Attorney-General. The office was created by statute in 1855, and the statute creating it provided that the Legislature should elect an incumbent who should serve until the next general election. The Legislature had failed to elect, and the Governor claimed the right of appointment, on the ground that there was a vacancy. The Secretary of State refused to commission the appointee, and the Court denied the Governor's right to make the appointment. The validity of the statute was not contested; the question being one of construction. Its validity seems to have been conceded: *Collins v. State* (1856), 8 Ind. 344.

A similar concession seems to have been made in the case of a director of the State Prison, who was chosen by the Legislature: *Baker v. Kirk* (1870), 33 Ind. 517.

In 1868, a retiring board of the army reported that a colonel, a breveted major-general, ought to be retired; the President retired him, under an Act of Congress, with the full rank of major-general. Subsequently an Act of Congress attempted to change his retired rank to that of brigadier-general. While it was said that appointments to office could be made only by the executive branch of the Government in the manner provided by the Constitution, yet the later Act of Congress only had the effect to change his rank and not to change his office: *Wood v. U. S.* (1879), 15 Ct. Cl. 151.

A letter of Jefferson to Samuel Kercheval, dated July 12, 1816, has often been cited upon the point under discussion. In that letter he said—"Nomination to offices is an Executive function. To give it to the Legislator, as we do [speaking of Virginia], is a violation of the principle of the separation of

powers. It swerves the members from correctness, by tempting to intrigue for offices themselves, and to corrupt barter of votes; and destroys responsibility by dividing it among the multitudes. By leaving nomination in its proper place, among executive functions, the principle of the distribution of power is preserved, and the responsibility weighs with its heaviest force on a single head."

This letter, and others of Mr. Jefferson, have received attention from the Supreme Court of California. In that State the Constitution provided that "The powers of the Government of the State of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted." Another clause in the Constitution provided that "All officers or commissioners, whose election or appointment is not provided for by this Constitution, and all officers or commissioners whose offices or duties may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct." The Legislature passed a law providing for a board of trustees to control the State Library, and that such trustees should be selected by the Legislature in joint convention assembled. This Act was held valid. Commenting on Jefferson's letters, the Court said—"No doubt these views as to the intrinsic nature of the power of appointment or of nomination to office, and of the expediency of confining it to the executive department of the Government, are entitled to the highest consideration; but the question here is not what the Constitution ought to be, but what it is, or, in other words, what was the intention of its framers as to this

particular matter? Of course, if there had been at the time of its adoption a general consensus of opinion in harmony with the views of Mr. Jefferson, we should be forced to conclude that its framers intended to forbid to the Legislature the exercise of the power of appointment to office, but there was no such consensus of opinion. On the contrary, it had not only been decided in other States of the Union, under Constitutions containing provisions substantially equivalent to the sections above quoted from our own, that the Legislature could fill offices by itself created, but our own Supreme Court, construing provisions of our old Constitution, had come to the same conclusion:" *People v. Freeman*, S. Ct. Cal., Aug. 30, 1889.

Accordingly it was held that the Legislature could appoint a physician for the State Insane Asylum: *People v. Langdon* (1857), 8 Cal. 1. So, *People v. Fitch* (1851), 1 Id. 519, an instance of appointment by the Legislature of a State printer.

In Maryland, it was held that the Legislature could appoint to an office, even taking that power from the Governor, when it had created the office, and expressly authorized or tacitly allowed him to fill it by appointment. MASON, J., said that Article 2, Section 11, of the Constitution, provides "that the Governor shall appoint all officers 'whose appointment or election is not otherwise herein provided for, unless a different mode of appointment be prescribed by the law creating the office.' In few words, we think this provision means, simply, that the Governor shall have the power to fill all offices in the State, whether created by the Constitution or by Act of the Assembly, unless otherwise provided by one or the other. * * * * The office we are now considering is one of legislative creation; and by the Legislature it can be modified, controlled, or abol-

ished; and within these general powers is embraced the right to change the mode of appointment to the office. We have only to add that as the Legislature has the power to withdraw the authority to appoint from the Governor, the mode pointed out by the Act of 1854, by which the inspectors under that Act were to be designated and qualified, was a constitutional exercise of legislative power, and we need not say whether the inspectors, under the Act of 1854, are technically officers in point of law or not." *Devis v. State* (1854), 7 Md. 151.

In Missouri, the appointment by the Legislature was upheld, but the statute was not questioned. It was a matter of construction: *State v. Lusk* (1853), 18 Mo. 333.

In Nevada, the Legislature incorporated the town of Carson, and appointed the Board of Trustees for the first year. It was contended that the act of appointment was void. A provision almost identical with the provision in the Indiana Constitution was in the Constitution of Nevada; that is, dividing the powers of the government into three departments, and excluding all persons charged with authority under one from exercising it under either of the remaining two. The Governor was authorized to fill any office which, from any cause, should "become vacant, and no mode" was "provided by the Constitution and laws, for filling such vacancy, * * by granting a commission," which expired at the next election and qualification of the person elected to such office, for the provision was that "All officers whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law." The constitutional provision referred to was held not to apply to the officers selected, and that the Legislature had full power to make the appointments: *State v. Rosenstock* (1876), 11 Nev. 128. A like decision was made by the same

Court, where the Legislature had selected county officers for a newly created county, by a clause inserted in the Act creating the county. In such an instance it was deemed that there was no vacancy for the Governor to fill; for at the instant the office came into existence, it was filled, and not vacant: *State v. Irwin* (1869), 5 Nev. 111.

In New York, a statute provided that no committee or member of the Common Council of a city, should "perform any executive business whatever, except as is or shall be especially imposed on them by the laws of this State, and except that the Board of Aldermen may approve or reject the nominations made to them as hereinafter provided." A subsequent act authorized the Council to elect or appoint a Commissioner of Deeds for the city, and this act was held valid: *Ackley's Case* (1856), 4 Abb. Pr. (N. Y.) 35.

In New York, the Constitution provided that all city, town and village officers, and all county officers, should be elected in a certain way; and "all other officers, whose election or appointment is not provided for by this Constitution, and all officers whose office may hereafter be created by law, shall be elected by the people, or appointed as the Legislature may direct." The Legislature created a Board of Education and selected the trustees for it, and this action was held authorized by the Constitutional provision quoted: *People v. Bennett* (1867), 54 Barb. (N. Y.) 480. See *People v. Draper* (1857), 15 N. Y. 532; *People v. Albertson* (1873), 55 Id. 50.

In North Carolina, the Constitution provided that "The Governor shall nominate, and, by and with the advice and consent of a majority of the Senators elect, appoint all officers whose offices are established by this Constitution, which shall be created by law, and whose appointments are not otherwise

provided for, and no such officer shall be appointed or elected by the General Assembly." It was held that the words, "whose appointments are not otherwise provided for," meant "provided for by the Constitution," and the words, "no such officer shall be appointed or elected by the General Assembly," were added as an express veto upon the power of the General Assembly to appoint or to elect an officer, whether the office was established by the Constitution or was created by an act of the General Assembly. Therefore, an act attempting to vest in the President of the Senate and the Speaker of the House of Representatives all the power vested in the Governor to appoint a proxy, or proxies, or directors, to represent the interest of the State in any corporation, or company, in which the State had an interest, was held void; because it created a new office, took from the Governor his constitutional right of appointment, and placed the appointment in the Legislature; contrary to the express veto of the Constitution: *State ex rel. Clark v. Stanley* (1872), 66 N. C. 59.

So, an Act of the Legislature, vesting in that body the appointment of Trustees of the State University, Directors of the Penitentiary, of the Lunatic Asylum, and of the Institution for the Deaf and Dumb and the Blind, was void: *People ex rel. Wilker v. Bledsoe* (1873), 68 N. C. 457; *People ex rel. Nichols v. McKee* (1873), 68 Id. 429; *University R. R. Co. v. Holden* (1869), 63 Id. 410.

Section 27, Article 2, of the Constitution of Ohio, is as follows: "The election and appointment of all officers, and the filling of all vacancies not otherwise provided for by this Constitution, or the Constitution of the United States, shall be made in such manner as may be directed by law; *but no appointing power shall be exercised by the General Assembly, except as prescribed in this*

Constitution, and in the election of United States Senators; and in these cases the vote shall be taken *viva voce*." And Section 2 of Article 7 contained this clause: "The directors of the penitentiary shall be appointed or elected in such manner as the General Assembly may direct."

It will be noticed that the first half of the section and the second section quoted are similar, in legal effect, to Section 1 of Article 15 of the Constitution of Indiana. In other words, these provisions left it to the General Assembly to direct the manner of making certain appointments.

After speaking of the claim of the Legislature to appoint, BRINKERHOFF, J., said: "To make good this claim, it must be made to appear that the power to direct the '*manner*,' the mode, the way in which an act shall be done, and the power and authority to do the act itself, are one and the same thing. But that they are not identical, or equivalent to each other, is too clear for argument, and almost too clear to admit of an illustration. To prescribe the *manner* of election or appointment to an office is an ordinary legislative function. To make an appointment to office is an administrative function. And under a constitution in which the philosophical theory of a division of the powers of government into legislative, executive and judicial should be exactly carried out in detail, the power of prescribing the *manner* of making appointments to office would fall naturally and properly to the legislative department; while the power to make the appointments themselves would fall as naturally and properly to the executive department. This exact adherence to theory, however, is seldom, if ever, found in any frame of government, and we refer to the distinction simply by way of reply to the claim, on behalf of defendants, in argument, that the power to prescribe the

manner of appointments includes the power of appointment itself, and to show that they are acts and powers wholly different and distinct from each other:" *State ex rel. v. Kennon* (1857), 7 Ohio St. 546.

SWAN, J., in the same case (at p. 570) used the following language: "Upon this question it seems to me only necessary to refer to the plain words of the Constitution. * * * Now, providing by law the manner in which an appointment shall be made, and making the appointment itself, are two different things. The first is pointing out the mode in which a thing shall be done, and the other is doing the thing itself. The one is legislative and directory; the other, administrative."

It was therefore held that the Legislature had no appointing power, and could not select commissioners of the State House, who were to complete it; nor directors of the State Prison: *State ex rel. v. Kennon* (1857), 7 Ohio St. 546.

The Constitution of Oregon provides—"The chief executive power of the State shall be vested in a Governor." Another provision, dividing the Government into three separate departments, is almost identical with the section quoted from the California Constitution. Another clause provided—"When, during a recess of the Legislative Assembly, a vacancy shall happen in any office, the appointment of which is vested in the

Legislative Assembly, or when, at any time, a vacancy shall have occurred in any other State office, or in the office of judge of any court, the Governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." The Legislature appointed railroad commissioners, and the act authorizing the appointment was upheld. The Court said—"Now if it could be shown that the power to appoint all officers which are not made expressly elective by the people, is a part of the chief executive power of the State, the appellant's contention would be sustained; but no authority whatever has been cited to sustain this view, nor is it believed any exists; on the contrary, the provisions of the fifth article of the Constitution, which relates to the executive department, all seem at variance with this view. The framers of this instrument evidently designed that no prerogative power should be left lurking in any of its provisions. No doubt they remembered something of the history of the conflicts of the prerogative in that country from which we inherited the common law:" *Briggs v. McBride*, S. Ct. Or., June 20, 1889. See a similar decision in *State v. Lusk* (1853), 18 Mo. 332, where there was a Constitutional provision like the California provision.

W. W. THORNTON.

Indianapolis, Ind.

Supreme Court of California.

PEOPLE v. LEE CHUCK.

Under the California Code of Civil Procedure (§ 2052), when it is sought to impeach a witness, by asking him what he said at a former trial, he must first be shown his former statements, if reduced to writing, and have them read to him, if he is not acquainted with the language in which they have been written.

The mere absence of a co-defendant cannot be used to establish the guilt of the accused.

It is error, on a criminal trial, to argue, at the same time, for the admission of evidence and also for its effect if admitted: such conduct unduly prejudices the jury. This rule is the same, at whatever stage of the trial such arguments are used.

Where the jury, in a criminal case, after being charged and after retiring, and before agreeing upon a verdict, indulge in wine and cognac, even in a moderate degree, their verdict will be set aside.

In banc. Appeal from Superior Court of the city and county of San Francisco.

George A. Knight and *H. H. Lowenthal*, for appellant.

George A. Johnson, Att'y-Gen., for appellee.

WORKS, J., March 5, 1889. The appellant was charged, tried, and convicted of the crime of murder in the first degree, and sentenced to death. He moved the Court below for a new trial, which was denied, and now prosecutes this appeal.

Several grounds for reversal are urged, which may be grouped and considered as follows—

(1) Alleged erroneous rulings of the Court below on the admission and exclusion of evidence.

(2) Misconduct of the District Attorney.

(3) Misconduct of one of the jurors in visiting and inspecting certain premises during the trial, unaccompanied by the officer of the Court, and without leave.

(4) Misconduct of the jury in drinking intoxicating liquors while deliberating upon their verdict.

(5) Error in the instructions of the Court.

The evidence is not all in the record. The bill of exceptions recites, substantially, that there was evidence tending to show that the appellant shot and killed one Yen Yuen, on one of the streets of the city of San Francisco; that he attempted to escape; was followed by an officer, whom he also attempted to shoot; was arrested, and found to be armed with four revolvers, and protected by a coat of mail, made of links of steel, worn under his clothing; that at the time of the shooting he

was accompanied by several other persons, who also ran away immediately afterwards ; that the deceased had a pistol on his person which was fully loaded, none of the chambers having been discharged. There is no general statement showing what the defendant proved in his defense, or its tendency.

1. During the cross-examination of one Chow Hin, a witness for the prosecution, he was asked by the defense how long he had known the defendant. He answered—

“Several years ago, because it was on last year six months 28 day that he killed Yen Yuen, and I knew him about a year before that.”

The defendant moved the Court to strike out so much of the answer as referred to the killing of Yen Yuen by the defendant, on the ground that it was not responsive to the question. The motion should have been sustained, but, as the record comes to us, we cannot say that any injury could have resulted from the ruling of the Court. The killing of the deceased by the defendant may have been, and we infer from the matters appearing in the record was, an undisputed, though perhaps not an admitted, fact, the defense being that the killing was justifiable. If so, the statement of the witness was harmless.

The same witness was asked whether he did not testify to certain things before the Police Court, and answered that he did ; whereupon the prosecution asked him whether he did not at the same time make certain other statements. To this the defendant objected, and the objection was overruled, but there is nothing in the record to show that the question was answered by the witness. To render a ruling, in favor of the admission of evidence, material, the record must show that the question objected to was answered, thereby carrying the objectionable evidence to the jury. It is unnecessary, therefore, for us to determine whether the evidence that might have been elicited, was competent or not.

The defense, on cross-examination of one Sorr Sinn, asked whether he did not, on a former trial of this case, make certain statements, when the following occurred—

The district attorney objected on the authority of *People v. Ching Hing Chang* (1887), 74 Cal. 389, holding that whatever the witness might have said at the former trial, he had the statutory right to have it presented to him, and read, if in writing.

The Court remarked to counsel for defendant: "I would sustain you if I could reverse the Supreme Court, but I cannot."

As the rule referred to is well established, and one in every respect fair and just, it is fortunate that the Court below was not possessed of the power to reverse it. There was no error in this ruling.

The bill of exceptions recites—

"Evidence having been introduced by the prosecution, tending to show that Lee Chuck, the defendant, and Quan Gee and Chung Kit and Chung Wye and Chung Sam were present at, and participated in, the killing of Yen Yuen, the deceased, the defense then introduced evidence tending to show an *alibi* for Quan Gee and Chung Kit, and also tending to show that Lee Chuck and Chung Wye and Chung Sam were first attacked by Yen Yuen and Chow Hin and others, and that Lee Chuck and Chung Wye and Chung Sam shot in self-defense at Yen Yuen and his party."

The prosecution then proved by the witness, Cox, that he was an officer; that he had received certain warrants of arrest for the persons above named, and that he had never been able to serve two of them, although he had made every effort to find the parties, and the warrants not served were offered in evidence, and excluded; but the Court permitted the witness to testify that he had searched diligently for the parties who had not been found, and that if he could have found them, he would have arrested them on the charge set out in them, which the district attorney had openly stated to the jury was the same offense for which the defendant was being tried. As to the other party named, the prosecution was permitted to prove that he had been arrested where he had been found, several hours after the shooting, in a small "cubby hole" at the top of a house near the place of the shooting. The witness was permitted to testify minutely to the nature of the room, its furniture, the means of reaching it, with the view, we suppose, of showing that he was there in hiding to avoid arrest. The evidence was objected to by the defense on the general grounds that it was immaterial and incompetent.

For what purpose, or upon what theory, the evidence was admitted, does not clearly appear. We can only infer it from the statement of the district attorney, made in support of his offer, which will be set out hereafter in connection with another point made. His position, in brief, was, that as to those who

were not found, it tended to show that they were not innocent and acting in self-defense, as claimed, or they would not have run away ; and that the fact that they were not present to explain what occurred at the time of the shooting was a circumstance against the defendant, and was "offered to show the utter improbability of this self-defence fabrication ; that is why this is offered."

There is nothing to show that the defendant was in any way responsible for their absence, or that he was not as desirous that they should be present as the prosecution. This is to permit the act or conduct of one party, after a crime is claimed to have been committed, indicating his guilt, to be proved as against another in no way connected with such act or conduct. We are wholly unable to see upon what rule of law or justice such a ruling can be upheld.

People v. Sharp (1887), 107 N. Y. 427, is a case in point. There the defendant was charged with bribery. The prosecutor, as a part of his evidence, offered to show by a detective officer that he was employed to serve subpoenas upon three other parties, all of whom the district attorney claimed to be material and competent witnesses, and to show, further, that the detective was unable to find them in the State, but did find one of them in Canada, and learned that the others were there, but did not see them. These persons were named in the indictment as co-defendants with Sharp, and the evidence already intended to show that they were mediaries between the persons offending against the statutes relating to bribery. It was not claimed by the prosecution, that the defendant was privy to their absence. The district attorney disclaimed any intention of proving the flight of those persons as co-conspirators, and so make use of their absence as evidence of guilt, or an admission of their conduct that the accusation against the defendant was true, but for the purpose of explaining his inability to produce them as witnesses.

In the case before us, the district attorney openly avowed that the evidence was offered to disprove the defendant's defense, or, in other words, to prove his guilt. In the case referred to, the Court says—

"The evidence already in, was, so far as Sharp was concerned, altogether circumstantial, but tended to show that the persons named, or some of them, were qualified from actual knowledge, to give evidence bearing more or less directly upon the very point in issue. We think evidence of their absence was inadmissible. It could have no legitimate bearing upon the issue, and the danger is very great that such testimony will prejudice a party against whom it is offered. It may be and frequently is admissible, in answer to evidence from the other side, which would naturally call for an explanation. But the absence out of the jurisdiction of the Court, of an associate, or one seemingly connected with the defendant, in the act charged, is easily construed as evidence of guilt, and, unless the occasion calls for such proof, it should not be allowed. It is an old maxim that, 'he confesses the fault who avoids the trial,' but in its application, even to the fugitive, there is great danger of error. A man may avoid the trial for many motives besides consciousness of guilt, but, however actuated, his conduct can in no degree, in a court of justice, reflect upon another. Its admission in this case was virtually saying to the jury—'There is better evidence, and it might be had from the defendant's associates. It is not the fault of the prosecution that the evidence is not before you, but because of the voluntary act of those who, with the defendant, stand charged with the offense.' Thus, the non-production of the witnesses is made to supply the place of proof of the issue; with that issue, the evidence has no possible connection. The rule is, that where a party to an issue on trial has proof in his power which, if produced, would render material, but doubtful, facts certain, the law presumes against him if he omits to produce that proof, and authorizes a jury to resolve all doubts adversely to his defense. But the rule cannot be applied, unless it appears that the proof, whether it is a living witness or paper, is within his power. It is easy to see that the evidence offered here might be used for an ulterior purpose, although not pressed by the prosecution, yet entertained and made effective by the jury, and there certainly could be no presumption that the prosecution had the power to produce any particular witness, certainly not one of those named, nor did the law require it of them. It is therefore impossible to find any reason for, or lawful purpose to be gained by, the proof offered, and its admission was a very dangerous innovation upon the general rule, which excludes it as irrelevant to the issue. * * * Proof even of the absence of these persons was inadmissible. But that was not all. The proof was not only of their absence, but of unavailing search by a detective, the service of a subpoena upon some of them, and the failure to obey its mandate. Under the circumstances of the case, the ruling of the Court in this instance may not have been of much importance, and upon it alone we should not grant a new trial. But the legal principle which requires relevant and material evidence, and admits no other, is important; and, however serious the charge against an accused may be, and however great the evil it uncovers, he cannot properly be made the subject of a judicial sentence, unless the crime is substantiated according to the established rules of evidence."

It will be seen that the evidence improperly admitted was held not to be of sufficient importance to warrant a reversal of the case, but it must be borne in mind that the evidence there was not offered to prove guilt, while here it was offered for that purpose, and so went to the jury. Having gone to the jury

for that purpose, its injurious effect upon the rights of the defendant must be apparent. We hold that this was a fatal error, for which a new trial should have been granted.

As to the evidence of the arrest of the party who was found by the officer, it was claimed by the district attorney to have been competent to disprove an *alibi*, attempted to be proved by the defendant. If competent at all for this purpose, the proof of his presence near the scene of the alleged crime was all that the prosecution was entitled to. The fact that there was a warrant for his arrest for the crime for which the defendant was on trial, and that he was found under circumstances tending to show that he was in hiding, and seeking to avoid arrest, were wholly immaterial. But we are quite clear that it was not competent for that purpose. There is nothing to show that his whereabouts tended in any way to establish the presence of the defendant at the place of the killing, and it appeared that the time, to which the testimony referred, was several hours after the homicide occurred. It was error to admit the evidence.

2. It is claimed that the assistant district attorney was guilty of misconduct which prevented the defendant from having a fair trial. At the time the warrants, above referred to, were offered, and under discussion, the following proceedings took place—

“Assistant District Attorney.—The defense set up here is the plea of self-defense. They claim that Yen Yuen, Chow Hin, and other persons, assaulted Lee Chuck, Chung Sam, and Chung Wye, and under such circumstances that would make Chow Hin the principal in an attempt to murder—murder by way of lying in wait, which would be murder in the first degree. We now offer to show that upon the same day—

“Attorney for Defendant.—I object to the counsel's statement, and as to his offer of proof. He offered the warrants, and the objection is before the Court.

“Assistant District Attorney.—I am answering your objection. We offer to show that upon the same day, the 28th day of July, Chow Hin, who, it is alleged, picked up Yen Yuen's pistol; Chow Hin, the unsuccessful murderer of Lee Chuck; and Chow Hin, the person who will be rated here as a highbinder and a gambler; Chow Hin went down to the proper police authorities and made complaint against Chung Sam and Chung Wye, and had warrants issued for their arrest for murder; that these warrants were placed by the chief of police in the hands of the most skillful detective in the Chinese quarter.

“Attorney for Defendant.—I most strenuously object to the statement of counsel as to the warrants, and what disposition was made of the warrants. He offered certain warrants against Chung Sam and Chung Wye, and I say it is improper to

prejudice the jury by speaking of cases—of any other person except the defendant. The object is to prejudice the minds of the jurors against the defendant.

"The Court.—Proceed.

"Attorney for Defendant.—I except to the ruling of the Court on behalf of the defendant.

"Assistant District Attorney.—I offer to show further that this skillful detective officer, who has had several years' experience, who has had eight or ten years' experience among the Chinese, searched high and searched low, and searched every Chinese outgoing steamer, which he could search, and has not been able to discover either Chung Sam or Chung Wye, the innocent attacked parties who were with Lee Chuck at the time that Yen Yuen and Chow Hin and Fong Fat, and those other people, made this malicious attack upon them with pistols, on Washington street. We want to go to the jury on that fact, and we want to ask why these men are not here. We want to know why they should run away from here; why they do not make their appearance here, if they were attacked; why these men, who took part in this conflict, do not come here to this Court and explain how it was, of all the people in the world, Chung Sam and Chung Wye, the men who were with Lee Chuck.

"Attorney for Defendant.—I protest now, in the name of justice, that the district attorney be not allowed to proceed in the manner in which he does." It is improper testimony, and an illegitimate manner to produce testimony before the jury.

"Assistant District Attorney.—It is not in this view that this testimony is offered.

"Attorney for Defendant.—I protest against it, and I want the record to show it.

"Assistant District Attorney.—It is offered to show the utter improbability of this self-defense fabrication; that is why this is offered."

We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the Court, the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict, by illegitimate and unfair means, is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the Court to do his duty, and not go beyond it.

We regret to say that the assistant district attorney seems to have failed, in this instance, to apply this salutary check to his conduct. The evidence he was seeking to have admitted,

was clearly incompetent. What was said, was not only an argument in favor of its admission, but as to its effect. The evident intent was to prejudice the jury against the defendant, by commenting upon the conduct of others, over whose action he was not shown to have any control, and that in language, the impropriety of which is apparent at a glance. The Court was appealed to time and again to prevent it, but declined to do so. While we might hesitate to reverse the case on this ground alone, we hold it to have been error. See, as bearing on this point, *People v. Mitchell* (1882), 62 Cal. 411, and cases cited; *State v. Smith* (1876), 75 N. C. 306.

Questions of this kind usually arise out of the closing arguments of counsel, but the rule must be the same at whatever stage of the cause the improper language is used.

3. It is claimed that there was misconduct on the part of the jury, which entitled the defendant to a new trial. As to the alleged misconduct of one of the jurors, in visiting and examining certain premises, unattended by an officer, and alone, it was not made one of the grounds for a new trial, and for that reason cannot be considered here.

The grave charge is, that the jury drank intoxicating liquors while they were deliberating upon their verdict. The affidavits show, beyond question, that the case was given to the jury at 3.35 o'clock in the afternoon; that they had failed to agree at the hour of 6.30, when they were taken, in charge of a deputy sheriff and bailiff, to a restaurant for dinner; that they were served with a "French dinner," and, with other refreshments, partook of a half dozen quart bottles of claret wine and a half bottle of cognac, the latter being used as flavoring for their coffee; that they were about an hour at the restaurant, when they returned to their room, and within two hours agreed upon the verdict that was returned into Court. There are affidavits showing that when they returned from their dinner, their conduct and appearance, or that of some of them, were such as to indicate that they had been indulging in intoxicating liquors, and it is alleged that their having done so resulted in their agreeing upon the verdict. The two officers in charge make affidavit that none of the jurors were intoxicated, or gave any evidence of being in that condition. Each of the jurors makes

an affidavit, in which he admits that they drank wine, and took cognac in their coffee, but he does not know how many bottles. Their affidavits are, we believe, substantially, if not precisely, alike, and in each it is said—

“And this affiant further avers that, upon the said occasion, this affiant was not drunk, or intoxicated, and that this affiant's intelligence and good judgment were not obscured, or affected in any way, by intoxicating drinks of any character, and, as far as his observation extended, no one of said jury became drunk, or intoxicated, upon said occasion, and that the intelligence and good judgment of no one of said jury became, or was obscured, by intoxicating drinks upon said occasion;” and, further, “that he, for himself, did not find any such verdict against the defendant by reason of partaking of the liquor and wine above mentioned; and this affiant repels and repudiates the truth of any insinuation that he, or, so far as his observation extended, any of the members of the jury, found any such verdict against the defendant by reason of partaking of the liquor and wine above mentioned.”

It appears, therefore, that the amount of liquors mentioned was consumed. Whether it was equally divided—one pint of the wine to each juror—does not appear. If any juror drank less, he has refrained from saying so, perhaps out of delicacy for the feelings of his associates, who would be convicted thereby of having taken more.

The learned attorney-general contends that this was not such misconduct as should reverse the case, because the wine was “California claret,” and the cognac was used as a “flavoring for coffee.” Whether he intends to insinuate that California claret is too weak to intoxicate, or to claim that to drink wine of our own make should not be treated as misconduct, does not appear; nor does he show that cognac is less effective when adulterated with coffee. The affidavits show that the wine was intoxicating, and the prosecution introduces the affidavit of the proprietor of the restaurant to show its age, quality, and probable effects. He says—

“Said claret wine was a good quality of California Zinfandel wine, of four years of age;” and that he has “been engaged in the restaurant business for a period of ten years past; that he has had great experience with wines, and their effects, and that he scouts, as foolish and absurd, the idea that twelve full-grown men could be seriously or at all affected by using, if they did use, six bottles of claret at dinner, with a little cognac in their coffee afterwards.”

It must be conceded that this is some evidence that the whole twelve could not have been seriously or at all affected, and perhaps that none of them were so affected, assuming that

the wine and cognac were equally divided. We are thus led to consider, at the outset, whether this Court should stop to inquire what was the effect of the drinking of these liquors. That the jury drank the liquors is not denied. The sole question raised is, whether the mind of any member of the jury was so affected thereby as to impair his intelligence or judgment, or render him less competent to transact, with clearness and impartiality, the grave duty resting upon him. It is infinitely more important that the channels of justice be kept pure and untainted, than that the verdict against this defendant shall be maintained. The question is not a new one.

In some cases it has been held that for a juror to take a drink of liquor during the trial, was sufficient ground for granting a new trial. The case before us presents quite a different question. Here the trial had closed. The life of the defendant was in the hands of the jury. They were deliberating upon a question of the gravest consequence to the defendant, to society, and to themselves. They had, up to the time of partaking of the liquors, failed to agree, and soon after, agreed upon and returned a verdict, that, if sustained, must send the defendant to the gallows. It seems to us that if the fact that the jury drank intoxicating liquors, without proof that it affected their minds, or the conclusion reached by them, could be held sufficient to set aside the verdict in any case, no stronger case than the one before us could be presented. We are of the opinion that where the proof of the drinking is clear and undisputed, and that it was done while the jury were actually deliberating upon their verdict, in a capital case, a verdict of conviction should not be allowed to stand. This is our conviction, independent of authority, but the great weight of authority is to the same effect: *People v. Gray* (1882), 61 Cal. 164, 183; *Leighton v. Sargent* (1858), 31 N. H. 119; *Brant v. Fowler* (1827), 7 Cow. (N. Y.) 562; *People v. Douglass*, (1825), 4 Id. 26; *Wilson v. Abrahams* (1841), 1 Hill. (N. Y.) 207; *Jones v. State* (1854), 13 Tex. 168; *State v. Baldy* (1864), 17 Iowa 39; *Ryan v. Harrow* (1869), 27 Id. 494; *Davis v. State* (1871), 35 Ind. 496; *State v. Bullard* (1844), 16 N. H. 139; *Pelham v. Page* (1846), 6 Ark. (1 Eng.) 533; *Gregg v. McDaniel* (1843), 4 Har. (Del.) 367.

In the case of *People v. Douglass, supra*, the Court said—

“It will not do to weigh and examine the quantity which may have been taken by the juror, nor the effect produced.”

And in *Leighton v. Sargent*—

“For the cause that brandy was furnished to the jury, and drank by several of them, while deliberating upon the cause, after retiring to form their verdict, we think the verdict must be set aside. The quantity drank was probably small; but we cannot consent that that fact should make a difference.”

So in *State v. Baldy*—

“The parties have a clear right to the cool, dispassionate and unbiased judgment of each juror, applied to the determination of the issues in the cause; and the use in any degree of that which stimulates the passions, and has a tendency to lessen the soundness of judgment, is itself conclusive evidence that the party, who has the right to the exercise of that dispassionate judgment, has been prejudiced in not having it as perfect as it existed in the juror when accepted, applied to the determination of the cause. If this is true as a general rule, and as applicable to civil cases, *a fortiori* is the rule applicable in criminal cases, and especially in this case, in which the offense charged involves obedience to passions stimulated more than others by the use of spirituous liquors, and, of course, in its correct determination, requiring the most careful guarding against undue influence from them.”

And, in *Davis v. State*, it is said—

“The bailiff, we may presume, had been sworn, in the usual form, to take charge of the jury, and keep them together without meat or drink, water only excepted, etc. The jurors had taken upon them an oath, well and truly to try the cause, etc., and had been solemnly sent out to deliberate upon questions involving the life of an unfortunate fellow-being. If misbehavior, such as that shown by the affidavits, and which is without attempted palliation or justification, should not be regarded as sufficient to set aside the verdict, it would be a stigma upon the law and a disgrace to the courts. We do not mean to say that the Court should enter upon the question as to how far such conduct was or was not excusable or innocuous. It will be time to decide that question when it shall come up. In this case it does not arise. We concede that on this point the authorities are not uniform. But as to the sufficiency of such misbehavior, unexplained, to set aside the verdict, the authorities are abundant and satisfactory.”

Also in *State v. Bullard*—

“There had indeed been other acts of misconduct in the case, but we think that the old law, forbidding the use of refreshments at all to jurors deliberating upon a verdict, although relaxed materially from its early severity, has not yet so far yielded as to exempt them wholly from the control of the Court in this particular. And we are of the opinion that the use of stimulating liquors by a jury deliberating upon a verdict in a criminal case, without first showing a case requiring such use, and procuring leave of Court for that purpose, is a sufficient cause for setting aside a verdict found against the prisoner in such circumstances, whether the use was an intemperate one or otherwise.”

The respondent cites the following authorities not already referred to, as opposed to the doctrine that the mere fact that the jury drank intoxicating liquors, is sufficient to set aside the verdict, without a showing that it did or might have affected the result: Pen. Code, § 1181, subd. 3; *People v. Williams* (1864), 24 Cal. 31; *People v. Brannigan* (1863), 21 Id. 339; *People v. Symonds* (1863), 22 Id. 349; *People v. Dannis* (1870), 39 Id. 625; *People v. Turner* (1870), Id. 370; *People v. Anthony* (1880), 56 Id. 397; *People v. Lyle*, decided Sup. Ct. Cal., October 31, 1884; 1 Bish. Crim. Proc., § 999; *State v. Caulfield* (1871), 23 La. An. 148; *Davis v. People* (1857), 19 Ill. 74; *Thompson's Case* (1851), 8 Grat. (Va.) 657; *State v. Upton* (1855), 20 Mo. 397; *Rowe v. State* (1851), 11 Humph. (Tenn.) 491; *Roman v. State* (1877), 41 Wis. 312; *Westmoreland v. State* (1872), 45 Ga. 225; *Kee v. State* (1873), 28 Ark. 155; *Russell v. State* (1876), 53 Miss. 382.

We have given these authorities our careful attention, and find that, while they support the general rule that misconduct of the jury should not avoid a verdict unless it appears to have injured the complaining party, in our judgment they do not shake the well-established and salutary rule above laid down, when applied to a capital case, where the misconduct occurred while the jury were actually deliberating upon their verdict.

Section 1181 of the Penal Code, relied upon by the respondent, provides (subdivision 3) that a new trial may be granted to the defendant—

“When the jury has separated without leave of the Court, after retiring to deliberate upon their verdict, or being guilty of any misconduct by which a fair and due consideration of the case has been prevented.”

It is urged upon us that the section referred to, sets forth and limits the kind of misconduct for which a new trial may be granted, and that to authorize the setting aside of the verdict it must affirmatively appear that a fair and due consideration of the case is prevented. Such a construction of the statute would compel a defendant, in every case of this kind, to show affirmatively that he had been actually injured by the misconduct complained of. None of the cases cited go to that extent, and if they did, we should not be inclined to follow them. That the jury in this case was guilty of misconduct, we

presume none will deny. The wrongful act committed was one the direct tendency and natural consequence of which was to affect their capacity to perform their duties. Such being the nature of the misconduct complained of, and the act being committed at the most critical time in the trial, when a cool head and unclouded brain was so essential to the preservation of the rights of the defendant, to allow the verdict to stand, could not, in our judgment, be justified by any rule of law, reason, or justice.

Of the many cases cited by respondent, there is but one where the punishment was death, and in none of them was the liquor drunk while the jury were deliberating upon their verdict. In most, if not all of them, it is conceded that the act was reprehensible, and should be punished; but they say that as the act was committed at a time during the progress of the trial, when it affirmatively appeared that no injury could have resulted, the verdict should not be disturbed. Thus, in *Russell v. State* (1876), 53 Miss. 382, the Court said—

“ No cause can be more baneful to the purity of a verdict than the use of intoxicating drinks by the jury while engaged in their deliberations. Nothing can be more revolting to a sense of justice, or of decency, than the idea of the life, or liberty, of a citizen depending upon the maudlin deliberations of drunken jurors. The parties in a civil suit, and *a fortiori* the defendant in a criminal prosecution, have the right to demand that the case shall be tried, not only by jurors who are not drunk, but by men whose minds are not even influenced or clouded by liquor. Intoxicating liquors as a beverage, therefore, should be rigidly and carefully excluded from the jury-room; and, if absolutely necessary for medical purposes, should be administered only in small portions, upon the prescription of a physician, and under the sanction of the judge. But, while the introduction of such liquors in any other manner, is highly censurable, and should be the subject of exemplary punishment, it will not vitiate the verdict, if it can be affirmatively shown not to have injuriously affected the deliberations of the jury. The trial lasted five days. The liquor was given to the jury on the night of the second and early in the morning of the third day. The State had not then closed its testimony in chief, nor the defendant commenced his. The quantity of liquor was small, and a portion of the second supply was drunk. Several of the jury are proved to have been affected by the spoilt beef, and it is stated that a number of them partook of the liquor. The quantity was therefore presumably insufficient to have seriously affected the minds of any of them. In addition, it was received at night and early in the morning, some hours before they were called upon in Court to listen to testimony, and two days before they retired to consider their verdict. Lastly, it is proved that, ‘their conduct during the whole trial was marked by great dignity, decorum, and propriety.’ Under these circumstances, we think it may be fairly said that it has been affirmatively shown that the verdict was not affected by the liquor.”

In the case of *People v. Lyle, supra*, this Court said—

“ The legal presumption is that jurors perform their duty in accordance with the oath they have taken: *People v. Williams* (1864), 24 Cal. 31; and that presumption is not overcome by proof of the mere fact that during a trial, which lasted over thirty days, two or three of the jurors, after the adjournment of the Court for the day, drank a few glasses of liquor at the expense of the District Attorney; that one of them partook of a dinner at the house of the same officer, under circumstances which render the act of invitation necessary, and of a supper at the hotel of his associate counsel, under like circumstances. Such acts, however improper or indiscreet, could not, in themselves, have affected the impartiality of any one of the jurors, or disqualified him from exercising his powers of reason and judgment, and they will not warrant a Court in setting aside a verdict. ‘ While the law,’ says Chief Justice SHARKEY, ‘ is rigidly vigilant in guarding and preserving the purity of jury trials, yet it will not, for light or trivial causes, impugn the integrity of juries, or question the solemnity and impartiality of verdicts ’: *Herr v. State* (1839), 4 How. (Miss.) 187. It is the settled rule that to warrant the setting aside of a verdict and granting a new trial, upon the ground of irregularities and misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct. When it is clear that the party against whom the verdict has been found, was not injured by the misconduct, the verdict will not be disturbed.”

It must be conceded that this case supports the contention of the respondent, but the facts are so different that it should have but little weight; and so far as it declares, in general terms, that to warrant the setting aside of a verdict, and granting a new trial, upon the ground of misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct, it is not in harmony with the cases on the question before us, nor does it coincide with our views on the subject, when applied to the circumstances of this case. In the case of *People v. Gray* (1882), 61 Cal. 164, 186, (decided by the Court in banc., all of the Justices concurring,) it was said—

“ It should be added here that, if it is necessary that intoxicating liquors of any kind should be drank by a juror, application for leave to do so should be made to the Court, who can make such allowance as will be proper. Jurors should not be allowed to judge for themselves in this matter. A defendant in a criminal case should not be called on to consent; and in any case when the party consents, if the juror becomes intoxicated, the verdict should not stand. The purity and correctness of the verdict should be guarded in every way, that the administration of justice should not be subjected to scandal and distrust.”

And it was there held that liquors furnished the jury were not suitable food, such as they were allowed to have by section

1136 of the Penal Code. The court below should have granted the defendant a new trial on this ground.

4. The appellant complains of one of the instructions of the court, in which it was attempted to define the right of self-defense. This instruction, taken alone, may be subject to criticism; but, taking the instructions as a whole, we think the law on that point was fully and fairly stated.

5. The appellant asked leave of the court to cross-examine the parties who filed affidavits in support of the verdict of the jury, which was denied, and this is urged as error. The defendant was not entitled to such cross-examination as a matter of right. The court might, in its discretion, have allowed it, but the refusal to do so was not error.

Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

BEATTY, C. J. I concur in the judgment and in the opinion of Mr. Justice WORKS, except upon one point. It appears that after the case had been submitted to the jury, and they had been for three or four hours deliberating of their verdict, they were by direction of the court sent in custody of two sworn officers to dinner. They were taken by the officers to a public French restaurant, where, in accordance with the invariable custom of the place, they were served with six quart bottles (a half bottle each) of California claret, which they consumed with their dinner, and a small *modicum* of brandy, which they used with their coffee. In other words, they had, under the sanction of the court, and in the presence and custody of its officers, an ordinary dinner, in a respectable house, embracing only the usual concomitants of that meal at that place. As to whether the jurors were at all affected by the wine and brandy so partaken, the affidavits were conflicting, but certainly there was ample evidence to warrant the judge of the superior court in finding that none of them were affected; and unless we are warranted in holding, as mere matter of law, that any drinking of wine by a jury, after retiring for deliberation, however moderate, and whether sanctioned by the trial court or not, is misconduct *per se*, or unless we can find as matter of fact that

men who use wine and brandy in the manner and to the extent these jurors did, and as thousands of men do every day without impeachment of their sobriety or decorum, are thereby necessarily deprived of their ordinary judgment and discretion, we cannot say that this jury was guilty of misconduct, or the defendant prejudiced in this particular. There is, it seems to me, a clear distinction in principle between this case, in which the jurors did, openly and without attempt at concealment, what was apparently, if not expressly, authorized by the trial court, and that class of cases in which jurors have themselves clandestinely conveyed intoxicating liquors into the jury-room, or where, with their connivance, it has been smuggled in by other unauthorized persons. In such cases the means of procuring the liquor amounts in itself to grave misconduct, and evinces a total disregard on the part of the jurors of their obligations and of the rights of the parties. By reason of this distinction, we are not, in my opinion, constrained by the authorities to hold, and I am unwilling to say that the jury in this case was guilty of misconduct.

I dissent : MCFARLAND, J.

The proper rule of conduct and qualification of jurors must vary with the age and civilization in which they live. In all times there has been a severer rule applied to the conduct of the juror after he had retired to deliberate upon his verdict than during the hearing of the cause. The tendency of modern times has been to equalize this rule by allowing more privileges to the juror after he has received the charge of the Court, and less during the continuance of the trial.

The ancient English rules never were in force in the United States, and in the application of the rule, to the drinking of intoxicating liquor by a juror, there is considerable conflict among the American courts.

Some of these courts hold that no matter who furnishes the liquor, or the amount taken, it will be sufficient to set aside the verdict ; others, that it is only

when it has affected the juror, or when it is given by the prevailing party, that the verdict is set aside.

The State v. Broussard (January 21, 1889), decided by the Supreme Court of Louisiana, is another recent case. Here it appeared that the case was given to the jury at 6 P. M., and that a verdict was reached at 11 A. M. next morning ; and that during that time the jury was served with two pint bottles, and about four six-ounce bottles of whiskey, the greater part of which was actually consumed by only two members of that body. The evidence did not show by whom the liquor was furnished or supplied, or that it was done under the orders, or with the consent or approval of the trial judge, and it was not shown that any of the members were or became intoxicated from the use of the liquors thus consumed ; but it was shown that in the morning, between daylight and

11 o'clock, two members of the jury together drank and consumed a pint and a half of whiskey, after which they became sick, and were unable to partake of any breakfast, and that they were in that condition at the very moment that the verdict was agreed upon.

In the opinion in this case the Court says: "We are constrained to believe that the absorption of so much intoxicating liquor on empty stomachs, after a night of discomfort, by these two jurors, must have had an injurious effect on their minds, and that it was the immediate cause of the sickness which they then felt. Under the facts in the record, and in view of the amount of the intoxicating liquor imbibed by these two jurors, we have no hesitation in holding that they, at least, were not in a condition to exercise the cool and dispassionate judgment which the law expects of every juror in deliberating over a cause involving the life or the liberty of a fellow-being, and that as a consequence, the accused has not had a trial by twelve men "good and true," as the law contemplates. * * * * It would be difficult to formulate or prescribe an inflexible limit to the practice, (of allowing jurors to drink intoxicants) and courts can do no more than guard against excesses in determining such questions. But the circumstances of this case disclose an outrageous abuse of the privilege which no court will sanction or tolerate."

The case of *Ryan v. Harrow* (1869), 27 Iowa 494, was an earlier decision, holding that the drinking of intoxicating liquor by the jurors, after they had retired to consider their verdict, irrespective of the fact whether they were under its influence, is sufficient to set aside the verdict. In this case the liquor was procured without the aid or knowledge of any of the parties to the action.

BECK, J., said: "Doubtless ardent spirits, to a certain extent, may be drank

without inflaming the passions or beclouding the reason, but, beyond a certain limit, they indisputably produce these results. Where that limit is with different men cannot be certainly known. Courts will not assume to determine the limit, and whether, in a case where jurors have indulged in the use of the dangerous liquid, it has been passed. Inasmuch as, in such a case, there can be no certainty of the purity and correctness of the verdict, that it is the result of cool and dispassionate deliberation and the honest exercise of reason, it will be set aside. In the business affairs of the country these very reasons often constrain those who employ men to discharge duties requiring coolness, deliberation and the calm exercise of the judgment for their performance with safety to life and property, to impose strict abstinence from intoxicating beverages upon those so employed.

"Engineers upon railroad locomotives, pilots upon steamboats, etc., etc., are often the subjects of such restrictions; not because indulgence in intoxicating liquors, within the very indefinite bounds of what is called moderation, would absolutely unfit them for the discharging of their duties, but because it is absolute certainty of perfect safety from the maddening influence of alcohol, in the entire abstinence from the use of all liquors in which it exists, and without such abstinence there can be no such safety."

This was a civil case.

The People v. Gray (1882), 61 Cal. 164, is another of the decisions which hold that the mere *fact* that liquor was drank during the deliberations of the jury by some of the jurors, without permission of the Court or knowledge of the defendant, is sufficient to set the verdict aside.

In the opinion it is said: "It should be added here that if it is necessary that intoxicating liquors of any kind

should be drunk by a juror, application for leave to do so should be made to the Court, who can make such allowance as will be proper. Jurors should not be allowed to judge for themselves in this matter. A defendant in a criminal case should not be called to consent, and in any case where the party consents, if the juror becomes intoxicated, the verdict should not stand. The purity and correctness of the verdict should be guarded in every way, that the administration of justice should not be subject to scandal and distrust."

SHARPSTEIN, J., in concurring says: "I think that the introduction of ardent spirits into the jury room, while the jury were deliberating upon their verdict, constituted misconduct *per se*."

MYRICK, J.: "It requires no argument to show that the beer, wine and whiskey consumed, was not suitable and sufficient food."

Some courts seem to make a distinction, in civil and criminal cases.

Thus, in New York, in the case of *Wilson v. Abrahams* (1841), 1 Hill 207, a civil case, it was held that the verdict should not be set aside, "unless there be some reason to suspect that the irregularity may have had an influence on the final result."

However, in *People v. Douglass* (1825), 4 Cow. 26, a criminal case, the rule of *People v. Gray*, was adhered to.

In Texas, the same doctrine was announced in *Jones v. The State* (1854), 13 Tex. 138. This has, however, been modified by a code provision as follows: "Mere drinking of liquor by a juror is not sufficient ground for granting a new trial." Under this provision, it was held in *Rider v. State* (October 31, 1888), that without proof that a juror became intoxicated, so as to render it probable that his verdict was influenced thereby, the verdict would not be disturbed.

In *Jones v. State* (1854), 13 Tex.

168, it was said: "Every day's experience must satisfy us that it is impossible to lay down a rule as to how much can be drunk without impairing the qualification of a juror for discharging the trust confided in him. Its effects have been well described by Scotland's most popular bard—

Inspiring, bold John Barleycorn,
What dangers thou canst make us scorn!
Wi'tipsey we fear nae evil,
Wi'usquebae, we'll face the de'il.

"Yes, it is but too true, that it will make a man bold and reckless, not only of consequences personally, but also of the rights of those whose life and most valuable interests, property and reputation are at stake; and its effect is so very different on different men, that it would be dangerous in the extreme to attempt to lay down any rule by which it could or should be determined, whether a juror had drunk too much or not, and the only safe rule is to exclude it entirely."

In *State v. Bruce* (1878), 48 Iowa 530, the Court made a distinction between cases where liquor was drunk during the hearing of the cause, and where it was drunk after the jury had retired to deliberate on their verdict:

"An examination of the numerous cases cited in argument, has led us to the conclusion, that, when the indulgence in intoxicating drinks occurs during the adjournment, and before the cause is finally submitted to the jury, the better rule is, in the absence of showing a prejudice, that the verdict should stand, and we think there is no good reason for making any distinction between civil and criminal cases in the application of the rule."

In this case the Court, however, expressly affirms *Ryan v. Harrow*, 27 Iowa 494 (*supra*), that when the drinking is after the jury has retired, the verdict must be set aside.

In Indiana, in a trial for murder,

after the jury were charged and put in the care of a bailiff, the bailiff, with two of them, went to a liquor and billiard saloon, where other persons were drinking and playing billiards, and the bailiff procured for each of them a drink of brandy, ginger, wine, nutmeg and sugar, which they drank, and which was paid for by one of them. The evidence showed that the bailiff asked the saloon keeper if he could fix up something for said jurors for the diarrhoea, but it did not appear where the other jurors were at the time when the two with the bailiff were in the saloon. There was no attempt to show that the jurors were really suffering from diarrhoea, how much liquor they drank, what effect it had upon their fitness to deliberate upon the case, or in any other way to break the force of the showing made for the defendant. The verdict was set aside: *Davis v. State* (1871), 35 Ind. 496.

In Missouri, without a code provision, it is held that even in capital cases, a verdict will not be set aside where intoxicants have been used by the jury during their deliberations, "unless it affected it, or the drink was furnished by an interested party:" *State v. Baber* (1881), 74 Mo. 292; *State v. West* (1879), 69 Id. 401.

In *Russell v. State* (1876), 53 Miss. 382, the Supreme Court, while holding that a verdict would not be set aside for the reason that intoxicants were imbibed by the jury, use the following strong language: "No cause can be more baneful to the purity of a verdict than the use of intoxicating drinks by the jury while engaged in their deliberations. Nothing can be more revolting to a sense of justice and decency, than the idea of the life or property of a citizen depending upon the maudlin deliberations of drunken jurors. The parties in a civil suit, and *a fortiori* the defendant in a criminal prosecution,

have the right to demand that the case shall be tried, not only by jurors who are not drunk, but by men whose minds are not even influenced or clouded by liquor."

In the recent case of *Burgess v. Territory* (September 15, 1888), the Supreme Court of Montana, in a criminal case where it was shown that several of the members of the jury took a single drink, during the trial, but were not intoxicated and drank nothing after they retired to deliberate on their verdict, held the refusal to set aside the verdict was not sufficient error for a reversal.

In *Commonwealth v. Thompson* (1851), 8 Gratt. (Va.) 637, a medical witness, being accidentally present at a hotel where the jury were brought by the Sheriff to be lodged for the night, invited some of them to drink, which they did, but though this was held highly objectionable, it was not sufficient to set aside the verdict.

In a criminal case in Ohio, during the consideration of the verdict, it was shown that about two o'clock in the night, the Deputy Sheriff went with one of the jurors to a saloon, where the juror obtained and drank a glass of whisky. A new trial was granted for this and other misconduct of the jury: *Weis v. State* (1871), 22 Ohio St. 486.

In a later civil case, in the same State (*Railroad v. Porter* (1877), 32 Ohio St. 328), where, during the progress of the trial, but before the jury had retired to its deliberations, one of the jurors and one of the counsel for plaintiff below, on their way to their respective lodgings, casually met, and while passing a saloon, the attorney remarked that he was tired and thought that he would take a glass of ale, and asked the juror if he drank ale. On receiving an affirmative reply, he invited him to go in and join him in taking a glass of ale, which they did, remaining there about five minutes, drinking but a single

glass each, during which time, nor at any time while they were together, was any allusion made to the case.

The Court said: "The rigor of the ancient rule in regard to jurors eating and drinking, the reason for it having ceased, has passed away. Still, inasmuch as intoxicating drinks may so easily disqualify them for an intelligent discharge of their duties, courts are, in all cases, jealous of their use by jurors; and some high authorities, refusing to draw a line short of total abstinence, have held that the drinking of spirituous liquors by a juror, during the progress of a trial, is sufficient ground for setting a verdict aside. But, more generally, the stringency of this rule has been so far relaxed, that the mere fact of drinking spirituous liquors by a juror in a civil case, during an adjournment of the trial, though censurable, is not regarded as a sufficient reason for overturning a verdict, unless there be some reason to suspect it may have had some influence on the final result of the case; for, otherwise, an innocent party would be punished for the censurable conduct of another person, which has occasioned no injury to either party."

In the early case of *Comm. v. Roby* (1832), 12 Pick. (Mass.) 519, it was said by SHAW, C. J., "where the irregularity consists in doing that which may disqualify the jurors for proper deliberation and exercise of their reason and judgment, as where ardent spirits are introduced, then it would be proper to set aside the verdict, because no reliance can be placed upon its purity and correctness."

In this case it was held that cider was not a forbidden article.

A very learned author and able judge has laid down the following rules as proper guides for decisions where verdicts are challenged for the reason that intoxicating liquors have been used by the jury during the trial:

1st. The mere fact that a jury, pending the trial, or while deliberating on their verdict, drink intoxicating liquor, without more, will not be sufficient ground for a new trial.

2d. It is no ground for a new trial, that a juror drank a small quantity for medicinal purposes, while suffering from real sickness, the quantity consumed not being sufficient to produce intoxication.

3d. Where drinking of ardent spirits by a juror is attended with other improper conduct, as where a juror separates from his fellows to drink in a bar-room, or where ardent spirits are conveyed to him by one of the parties, a new trial will be granted.

4th. A new trial will generally be granted where a juror eats or drinks at the expense of the successful party.

5th. The jealousy of the courts, that juries should not be subjected to any improper influences, is such that, if it appear that intoxicating liquors have been introduced into the jury-room, in a manner, or in quantities, which the affidavits leave *unexplained*, there is a *presumption* that the jury were improperly influenced thereby, and a new trial will be granted.

6th. Consent of counsel, or of the party (where the verdict is in his favor), will generally estop a party in a civil case from urging, as ground for a new trial, that the jurors indulged in ardent spirits, unless abuse is shown to have resulted from such indulgence, but not in cases of felony: 2 Thompson on Trials, 1933.

The suggestion presents itself, whether judges ought not to specially charge the jury to abstain from intoxicants during the trial, and further, whether it ought not be made a statutory ground of challenge against a person that he is addicted to the habitual use of intoxicants, from serving as a juror at all.

WM. M. ROCKEL,
Springfield, Ohio.

ABSTRACTS OF RECENT DECISIONS.

ACCIDENT INSURANCE.

Immediate written notice of an accident and injury was required by the provisions of an accident policy to be given to the insurer; on September 1, the insured sustained an injury to his eye, which he did not at the time regard as dangerous, but which subsequently caused the total loss of the eye; notice mailed to the company on October 1, was a sufficient compliance with the requirement of the policy. *People's Mut. Accident Asso. v. Smith*, S. Ct. Pa., May 6, 1889.

ATTORNEY-AT-LAW.

Authority of the attorney of a distributee of an estate does not extend to entering into an agreement, on behalf of his client, to refund to other distributees an amount voluntarily overpaid to such client upon a partial distribution. *Miller v. Hulme*, S. Ct. Pa., May 6, 1889.

BANKS AND BANKING.

Extension of charter of a national banking association by Act of Congress, does not create a new corporation, but simply gives a new lease of life to the one already existing, which consequently preserves its identity and remains liable upon its contracts made prior to such extension. *Nat. Exchange Bank v. Gay*, S. Ct. Err. Conn., April 27, 1889.

Note given to firm, one of whose members is president of a national bank, for the purpose of substituting it for paper of the firm, which had been discounted by the bank in excess of the limit permitted by law, during the inspection of the bank examiner, is valid in the hands of the bank, notwithstanding a promise by the president that the maker would never be called upon to pay it. *Allen v. First Nat. Bank of Warren*, S. Ct. Pa., May 27, 1889.

BILLS AND NOTES.

Agreement to renew at maturity, written across the face of a promissory note, destroys its negotiability. *Citizens' Nat. Bank of Towanda v. Piollet*, S. Ct. Pa., May 6, 1889.

Indorsement by bank to another bank, "for collection on account," of a draft, which was deposited with the former by a prior indorser, does not render the collecting bank a *bona fide* holder for value, and it cannot retain the proceeds of such draft in payment of a balance of account due it by the remitting bank. *First Nat. Bank v. Strauss*, S. Ct. Miss., April 22, 1889.

Indorser, who is not named as payee, but who puts his name upon the back of a note before delivery to the payee, on the faith of which money is loaned or credit given by the payee to the maker, is liable on the note as an original promissor. *Melton v. Brown*, S. Ct. Fla., June 11, 1889.

CRIMINAL LAW.

Statements by one fatally wounded, made immediately after he received his injuries to a person whom he called to his assistance, to the effect that he was robbed and assaulted about half a minute previously by men whom he described, are admissible in evidence as part of the *res gestae*, as are also similar statements, made ten minutes later to a personal friend for whom he sent immediately after being assaulted. *State v. Murphy*, S. Ct. R. I., June 17, 1889.

DESCENT.

Illegitimate child, born in Pennsylvania and rendered legitimate by the subsequent marriage and cohabitation of its parents in that State, is competent to inherit land in New Jersey from its father. *Dayton v. Adkisson*, Ct. Ch. N. J., June 22, 1889.

DOWER.

Under Statute of Westminster 2 (13 Edw. I. ch. 34), which provides that "if a wife willingly leave her husband, and go away, and continue with the adulterer, she will be barred forever of action to demand her dower that she ought to have of her husband's lands," it is necessary, in order to sustain a plea in bar of dower, to prove both that the wife deserted her husband willingly and that she was guilty of adultery during the desertion. *Henderson v. Chaires*, S. Ct. Fla., June 3, 1889.

FIRE INSURANCE.

Insurable interest is had by one who has entered into a contract for the conveyance of property to him upon the payment of certain promissory notes executed for the consideration money, although such notes are overdue and unpaid and the vendor has taken no steps to enforce their payment. *Gilman v. Dwelling-house Ins. Co.*, S. Jud. Ct. Me., April 23, 1889.

Insurable interest in mortgaged property remains in the mortgagor after the rendition of a decree of foreclosure, until the period for redemption has elapsed, but such interest is ended by a failure to redeem within the specified period, and a verbal promise by the mortgagee to resell the land to the mortgagor, made after the expiration of the period for redemption and without consideration, will not continue such interest so as to keep the policy in force. *Essex Sav. Bank v. Meriden Fire Ins. Co.*, S. Ct. Err. Conn., June 20, 1889.

Waiver of proofs of loss will not be inferred from mere silence on the part of the insurer, after the receipt of notice of loss. *Central City Ins. Co. v. Oates*, S. Ct. Ala., May 2, 1889.

LIFE INSURANCE.

Wife's policy upon the life of her husband, which contains no provision for payment to her children, in case of her death before that of her husband, does not inure to the benefit of her children in the latter event, but the proceeds of such policy constitute a fund for the payment of the husband's creditors. *Tompkins v. Levy*, S. Ct. Ala., May 29, 1889.

LIQUOR LAWS.

Prohibition of sale of cider, without any qualifying adjective, applies to all cider, without regard to the stage of fermentation or its intoxicating quality. *State v. Spaulding*, S. Ct. Vt., May 30, 1889.

Sale by druggist of intoxicating liquors, when forbidden by statute without reference to the intent with which they are sold, is not excused by the fact that they were sold in good faith as a medicine, without knowledge of their intoxicating properties. *King v. State*, S. Ct. Miss., May 27, 1889.

MASTER AND SERVANT.

Discharge, without sufficient excuse, before the expiration of the period of his employment, entitles an employe *prima facie* to the stipulated compensation for the entire period, and the burden is upon the employer to show, in mitigation of damages, that the discharged employe might, by reasonable effort, have obtained employment elsewhere. *Emery v. Steckel*, S. Ct. Pa., May 6, 1889.

NEGOTIABLE INSTRUMENTS.

Registered Virginia coupon consols, whether treated as bonds or as promissory notes, are not negotiable without indorsement. *Taliaferro v. Baltimore First Nat. Bank*, Ct. App. Md., June 12, 1889.

PUBLIC OFFICERS.

Custodian of public money, who has given bond for its safe keeping, is not discharged from liability by the failure of the bank where he has deposited such money. *Nason v. Directors of Poor for Erie Co.*, S. Ct. Pa., May 13, 1889.

RAILROADS.

Bridge, built by a railroad company at the crossing of its track over the public street, must be constructed of such material and in such manner, and maintained in such condition, as to make and keep it safe for public travel, and the railroad is responsible to a traveler for injuries sustained by reason of its failure to perform these duties. *Caldwell v. Vicksburg, S. & P. R. R. Co.*, S. Ct. La., June 14, 1889.

SLANDER.

Drunkenness, not being a criminal offense at common law and not having been made such by statute, words charging that a person has been drunk, are not actionable *per se*, although a municipal ordinance of the town where such person is resident makes intoxication punishable under certain circumstances. *Seery v. Viall*, S. Ct. R. I., April 27, 1889.

SUNDAY LAWS.

Delivery on Sunday to the sheriff of a contract of suretyship in a claim suit, renders the contract void, and no recovery can be had upon it. *Anderson v. Bellinger*, S. Ct. Ala., May 1, 1889.

TELEGRAPHS.

Stipulation in blank, upon which a message is written, that the telegraph company shall not be held liable in damages for mistakes caused "by the negligence of its servants or otherwise," beyond the amount paid for sending the message, is against public policy and void. *Gillis v. Western Union Tel. Co.*, S. Ct. Vt., April 22, 1889.

WATER-RIGHTS.

Owner of riparian lands has a right to have a stream of water flow through his lands in its natural state, without diminution of quantity or change of quality, and its obstruction or diversion will be restrained by injunction, but this rule is qualified by the limitation that each riparian owner is entitled to a reasonable use of the water for domestic, agricultural and manufacturing purposes. *Ulbricht v. Eufaula Water Co.*, S. Ct. Ala., May 7, 1889.

WILLS.

A test of testamentary capacity is, whether at the execution of a will the testator can remember the property he is about to dispose of and the objects of his bounty, and can understand the nature of the business in which he is engaged and the manner in which the will distributes his property. *McCoon v. Allen*, Prer. Ct. N. J., June 10, 1889.

Belief in spiritualism is not an insane delusion and does not incapacitate the person entertaining such belief from making a valid will. *Middleditch v. Williams*, Prer. Ct. N. J., June 17, 1889.

"*Surviving brothers and sisters*," as used in a will, which, after giving an estate in trust for life to testator's three daughters, provides that "from and immediately after the decease of my said daughters respectively (without leaving lawful issue), and as that event happens, I give and bequeath the estate and property of the daughters dying, which shall then be held by the said trustee under this, my will, to be equally divided among the surviving brothers and sisters, and the lawful issue of such as may be dead," refer, not to the time of the death of the testator, but to that of his daughters without leaving issue. *Woelpper's Appeal*, S. Ct. Pa., May 27, 1889.

JAMES C. SELLERS.

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THE COMMERCE CLAUSE AND THE STATE.

It has been a matter of observation, and of some concern, among thoughtful men in this country who have attended to the evolution of constitutional doctrine as declared by the Supreme Court of the United States, that that body has perhaps, in a few respects, unwisely expanded Federal power. For example, the view is held not only by strict constructionists, but by many who are in sympathy with the doctrine of a broad nationality, that the Court has erred in establishing as its law that the Federal Courts are not bound by the decisions of the courts of the State where they happen to be sitting, on matters of general commercial law, and other subjects not involving a construction of the Federal Constitution, statutes and treaties. The harmony of our two systems of government, State and National, would seem to require, not only that the State Courts should be permitted to construe their own Constitutions and statutes, but that the principles of general law established by them, should be obligatory upon the Federal Courts administering law in the several States and taking jurisdiction solely on the ground of citizenship. The establishment of a Federal commercial law is conceived to be an excrescence on the Federal system. The extension of Congressional power, by late decisions of the Supreme Court, has also been the subject of some animadversion. When the second series of Legal Tender Cases were decided (1870), 12 Wall. (79 U. S.) 457, it was charged that the Court was packed by President Grant, for the

special purpose of securing the desired judgment. The decision in this series of cases is now deemed sound by many who withhold their assent to the doctrine of the latest Legal Tender Case: *Juilliard v. Greenman* (1883), 110 U. S. 421, which declared that Congress may, in time of peace, and not strictly as a war measure, make treasury notes a legal tender.

Because of these, and perhaps a few other doubtful extensions of the power of the Federal Courts and the National Congress, some thinkers of an atrabilious tendency have worked themselves into the uncomfortable frame of mind of supposing that our great Court of last resort is chiefly occupied in a conspiracy against local self-government, as a principle of American law, and against the States, as organs of the expression of that principle.

In order to guard against such careless judgments, it is useful for the profession; holding, as it does, the Supreme Court in high esteem, not only as our chief protector of National interests, but also as the great conservator of State rights within the Constitution, occasionally to reflect upon the facts of the limitations upon Federal power that have been established by that body. It is proposed in this article to show, by a few illustrations of the evolution of the law of one of the great National powers—the commerce power—that the Court has maintained, and has indeed advanced upon itself in maintaining, the limitations of the Constitution as they relate to State functions of government.

The development of the Constitution, during a century of interpretation by the Supreme Court, is believed to have been mainly a natural and healthy growth, fully within the lines marked by those who framed it. If its words have expanded with the years, so as to give room for the growing Nation, it is conceived, generally speaking, that it is not because the Supreme Court has been false to its trust in interpreting them, but rather that it has been true and loyal to the purpose of its creation, in permitting them to have the full significance they were intended to possess. When the capacity of the words the statesmen of 1787 fixed in the Federal Constitution, comes to its final measure in the coming time, many believe that it will be among their best titles to renown that they framed an

instrument as potential of good in the hands of just interpreters in the future, as it was sufficient for the more immediate objects of its creators when it was first called into being.

The commerce clause of the first article of the Constitution, giving to Congress the power to regulate commerce with foreign nations and among the several States and with the Indian tribes, has, perhaps, more than any one grant of power in our fundamental law, helped to make us the Nation we to-day are. But they read the history of the formation of the Constitution wrong, if they read it at all, who assert that it was not the deliberate purpose of those who inserted it in the Constitution, to make it contribute in the way it has to the National growth. Hamilton and Madison and Wilson intended to make a Nation, as well as to construct an instrument of government. It is well known that the want of the power in the old Confederation to regulate commerce, assisted materially in bringing about the formation and adoption of the Constitution. The commerce clause was adopted by the Philadelphia Convention with unanimity and almost without debate, saving the portion of it relating to the Indian tribes. Immediately upon its adoption by the people, the petty restrictions on interstate trade that some States had established under the Confederation, gave way to unfettered freedom of intercourse. The unavailing, because ununited, efforts of the several Legislatures to develop American commerce, were abandoned for efficient Congressional action that gave the sea to our ships and gave ships to the sea. American vessels found the same anchorage in European ports that foreign ships were accorded here. He would have been a dull observer and a feeble patriot who failed to see and to welcome the new commercial order. All this was early fruit. The growing years have since brought into view the larger purpose of those who, while seeking an immediate good, were mindful of future needs—while building a structure for the day, were erecting for all time.

It has been remarked by jurists that the constitutional law of the commerce clause to-day, is practically the constitutional law of the first commerce case that came before the Supreme Court. Said Justice LAMAR, in *Kidd v. Pearson* (1888), 128 U. S. 1, 16—

"The line which separates the province of Federal authority over the regulation of commerce, from the powers reserved to the States, has engaged the attention of this Court in a great number and variety of cases. The decisions in these cases, though they do not in a single instance assume to trace that line throughout its entire extent, or to state any rule further than to locate the line in each particular case as it arises, have almost uniformly adhered to the fundamental principles which Chief Justice MARSHALL, in the case of *Gibbons v. Ogden* (1824), 9 Wheat. (22 U. S.) 1, laid down as to the nature and extent of the grant of power to Congress on this subject, and also of the limitations, express and implied, which it imposes upon State legislation with regard to taxation, to the control of domestic commerce, and to all persons and things within its limits, of purely internal concern."

The truth is, however, that practically there has been both an expansion and a limitation in respect of Federal commercial power—an expansion or enlargement of the subjects of the exercise of the power, a limitation or clear marking of the lines within which it is exercisable. There has been no expansion of doctrine as to the scope of the grant of power; but a very necessary enlargement of occasion for its exercise.

When it was decided in 1877 in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, that the Western Union Telegraph Company, having accepted the Act of Congress of 1866, could not be excluded by the Legislature of that State from doing business in Florida, it perhaps seemed to some a great advance on the doctrine of *Gibbons v. Ogden*, that the State of New York could not, by the grant of an exclusive franchise to one person, to navigate with boats moved by fire or steam all the waters within the jurisdiction of the State, deprive another person possessed of the right to carry on the coasting trade, from running steamboats between Elizabethtown in New Jersey and New York. It was merely, however, declaring that the telegraph, as well as the steamboat, was an instrument of interstate commerce. The power in Congress to construct interstate and transcontinental railway lines, considered in *California v. Central Pacific Railroad Co.* (1887), 127 U. S. 1, as well settled, and the power to pass such comprehensive legislation as the Interstate Commerce Act of 1887, regulating the management of the interstate railways of the United States, were vast additions of power to that enjoyed by the first Congress, only because the railway had joined the steamboat as an instrument of commerce, and

because the small territory of the infant republic of thirteen struggling States had grown to the imperial domain of a Nation of thirty-eight.

A large share of the evolution, if not alteration, of judicial opinion, as to the scope of the commerce clause, that is to be seen in its development thus far, is due to the ripening of thought on the subject of its limitations.

No better illustration of this is to be found than in, what might be called, the histology, and the subsequent history of the modern doctrine as to the exclusiveness of the power in Congress, to regulate interstate and foreign commerce.

"In the complex system of polity which prevails in this country," said Mr. Justice SWAYNE, speaking for the Court in *Ex parte McNeil* (1871), 13 Wall. (80 U. S.) 236, 240, "the powers of government may be divided into four classes: Those which belong exclusively to the States; those which belong exclusively to the National Government; those which may be exercised concurrently and independently by both; those which may be exercised by the States, but only until Congress shall see fit to act upon the subject. The authority of the State then retires, and lies in abeyance, until the occasion for its exercise shall recur."

At least three views have been promulgated as to the extent of the commerce power. They may for convenience be termed the earlier view, the later and maturer view, and the views of Mr. Justice DANIEL.

The reasoning of the great Chief Justice, in *Gibbons v. Ogden*, clearly points towards the broad and simple rule early laid down and adopted by some of the judges, if not by the majority of the Court, that the very grant of power to Congress to regulate commerce, *ipso facto* excludes all control over it by the States. Said the Court in its opinion in that case, p. 209—

"It has been contended by the counsel for the appellant that as the word 'to regulate' implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the Court is not satisfied that it has been refuted."

The case was in fact decided on the ground that Congress had regulated the particular subject matter under considera-

tion, and that therefore State regulation of it was impossible. But the argument sanctioned by the Court would lead to the conclusion that, whether Congress had acted or not, the States could not exercise power. Indeed Justice JOHNSON, in a separate opinion, distinctly affirmed and applied this doctrine to the case.

This position was maintained by Justice STORY in his dissenting opinion in *New York v. Miln* (1837), 11 Pet. (36 U.S.) 102, in which he stated that he had the concurrence of Chief Justice MARSHALL. Justice BALDWIN in his dissenting opinion in *Groves v. Slaughter* (1841), 15 Pet. (40 U.S.) 449, 511, Justice MCLEAN in the *License Cases* (1847), 5 How. (46 U.S.) 504, the same Justice and Justices WAYNE and MCKINLEY in *The Passenger Cases* (1849), 7 How. (48 U.S.) 283, and Justices MCLEAN and WAYNE in *Cooley v. Board of Wardens* (1851), 12 How. (53 U.S.) 299, held this view.

The Court was without cohesion on constitutional questions, after the death of Chief Justice MARSHALL in 1835. His vigorous personality seems almost uniformly to have moulded its opinions during his lifetime. During, what might be called, the era of individual views, which began with the case of *New York v. Miln*, in 1837, and continued for a score of years, the doctrine of the exclusiveness of power in Congress was the subject of very earnest and even acrid discussion among the members of the Court. Every case was a battle ground. The views of the individual judges were so diverse, that in some cases each judge wrote his own opinion, and no opinion of the Court was possible. In the *License Cases*, six judges wrote nine opinions. In the *Passenger Cases*, there were eight opinions.

In *New York v. Miln*, Justice THOMPSON declared that the power was not exclusive in Congress, but that State regulation was possible, unless Congress had acted on the particular subject in such a way as to antagonize the State law. In the *License Cases* Chief Justice TANEY and Justices CATRON, NELSON and WOODBURY, and in the *Passenger Cases* the Chief Justice and Justices NELSON and WOODBURY supported this view, Justice DANIEL in the latter case asserting it, and going much farther, as will be seen.

Justice DANIEL was infused with the doctrine of State sovereignty in its old sense. He magnified the State, he minified the Nation. In the *Passenger Cases*, he whittled down the word *commerce* to the smallest possible dimensions, making it equivalent to trade and navigation, and denying that it extended to intercourse, as established in *Gibbons v. Ogden*. In his conception, the grant of inter-State and foreign commerce power to Congress, was not only not exclusive, but was neither large nor comprehensive. A large residuum of such power was left in the States, to be exercised not merely if Congress had not interfered or should not interfere, but to be enjoyed to the exclusion of Congressional action in certain ways. In the *Passenger Cases*, he contended that the right of the State to admit foreigners upon its own terms, or to exclude them altogether, was purely a subject of State law. In *Cooley v. Board of Wardens*, he affirmed that the power to enact pilot laws, which were agreed to be regulations of commerce, was not within the terms of the grant to Congress, was an original and inherent power in the States, and was not one to be merely tolerated by or held subject to the sanction of the Federal Government. The opinions of Justice DANIEL are all vigorous and even profound, but the chief characteristic of his views, as related to the development of the law of the commerce clause, is their eccentricity. They contributed in no respect to the advancement of opinion, and do not seem to have been shared by other members of the Court. Their interest to-day is purely historical. The earnest and repeated objections expressed by some of the members of the Court, to the rigid doctrine of absolute exclusiveness of power in Congress, over commerce with foreign nations and among the States, brought about a re-statement of the law. The advocates of the non-exclusive theory practically had a majority as early as 1847, when the *License Cases* were decided. Four of the Justices, as already mentioned there, formally adopted it, and although Mr. Justice DANIEL then expressed no opinion on the subject, he believed wholly with the Chief Justice and Justices CATRON, NELSON and WOODBURY.

The non-exclusive theory, as stated at that time, is well ex-

pressed by Chief Justice TANEY in the *License Cases* (1847), 5 How. (46 U. S.) 504, 578. He said—

“It is well known that, upon this subject, a difference of opinion has existed, and still exists, among the members of this Court. But, with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear that the mere grant of power to the General Government can not, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and among the several States, is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress.”

The modern doctrine was first distinctly formulated and adopted by the Court in 1851, in *Cooley v. Board of Port Wardens*, 12 How. (53 U. S.) 299, 319. Said Mr. Justice CURTIS, speaking for himself and Chief Justice TANEY, and Justices CATRON, MCKINLEY, NELSON and GRIER, who composed the majority of the Court—

“The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question [pilots], as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert, concerning all of them, what is really applicable but to a part. *Whatever subjects of this power are in their nature National, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.*”

The counterpart of the rule was not definitely formulated till 1865, when Justice SWAYNE, speaking for the Court in *Gilman v. Philadelphia*, 3 Wall. (70 U. S.) 713, 726, said that to the extent that the subjects require rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively, the power to regulate commerce may be exercised by the States.

There was no absolute unanimity in the Court on this subject until much later. In *Cooley v. Board of Wardens*, Justices McLEAN and WAYNE expressly dissented, adhering to the old doctrine, and in *Gilman v. Philadelphia*, Justices CLIFFORD,

WAYNE and DAVIS dissented from the opinion on other grounds, but so as to weaken the force of the views as expressed by the majority. As late as 1872, it was asserted by the Court that it had "never yet been decided by this Court that the power to regulate interstate, as well as foreign, commerce, is not exclusively in Congress:" *Case of the State Freight Tax*, 15 Wall. (82 U. S.) 232, 279. It was not till 1875 that the whole Court united in the adoption of the modern rule. The case was *Welton v. State of Missouri*, 91 U. S. 275. The Court was then composed of Chief Justice WAITE, and Justices CLIFFORD, HUNT, STRONG, BRADLEY, SWAYNE, DAVIS, MILLER and FIELD. Mr. Justice FIELD defined the scope and limitations of the grant in the commerce clause, in terms which have been only slightly modified since. He said, at pp. 279, 280—

"The power to regulate conferred by that clause upon Congress, is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be hindered by duties and imports, and how far it shall be prohibited. Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of one country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it, embraces all the instruments by which such commerce may be conducted. So far as some of those instruments are concerned, and some subjects which are local in their operation, it has been held that the State may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is National in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority."

The only extension which is needed to this language, to make it absolutely full and comprehensive, is in the enlargement of the subjects included in the meaning of the word *commerce* as above defined, so as to embrace persons as well as commodities, traffic as well as intercourse, and covering navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities, and also the instruments auxiliary to these and directly connected therewith. Such late cases as *County of Mobile v. Kimball* (1880), 102 U. S. 691; *Webber v. Virginia* (1880), 103 Id. 344; *Transportation Company v. Parkersburg* (1882), 107 Id. 691; *Escanaba Co. v. Chicago* (1882), 107 Id. 678; and

Brown v. Houston (1884), 114 Id. 623; recognize this extension of meaning.

The modern doctrine, limiting the exclusiveness of the grant in the Constitution, to subjects of a national character, is the crystallization into a rule, of the wide national powers recognized in *Gibbons v. Ogden*, and the necessary State powers over matters affecting commerce, affirmed in *Wilson v. The Black Bird Creek Marsh Co.* (1829), 2 Pet. (27 U. S.) 245. The harmonious working of the governments, State and National, it is now seen, required the more plastic rule at present current. The fact that this doctrine is the outcome by logical deduction from early cases as now understood, does not the less give it the effect of a progressive limitation, so far as the Supreme Court is concerned. For the doctrine will always be placed for comparison, by the side of the view once held and enforced by STORY and MARSHALL, that the exclusiveness of the power in Congress was subject to no qualification whatever.

With what faithfulness, in working out the modern rule, the Supreme Court has remained true to the Constitution as it was intended to be, is shown by a passage in the *Federalist*. In the thirty-second paper of that collection, Hamilton said—

“This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.”

Another illustration of the clarification of thought, if not actual modification of opinion, as to the limitation of Federal power in favor of the States, is seen in the recognition of State power over the highways of interstate commerce, wholly within the borders of a State. When it was laid down in *Gibbons v. Ogden*, that the power in Congress to regulate interstate and foreign commerce did not stop at the jurisdictional or external boundaries of the States, but penetrated throughout their extent, a very necessary principle was established, without which the grant to Congress would have been of trifling value. But it would have been very easy to advance from this position, which carried with it the potential control by the United States of

the avenues of interstate commerce within the States, to the denial of actual control by the States of such avenues in the absence of Congressional action. For a time, it seemed as if the Court, by a liberality of interpretation of Federal statutes, was about to deny to the States this control. In the great *Wheeling Bridge* case (1851), 13 How. (54 U.S.) 518, the Court declared the erection of a bridge across the Ohio River, wholly within the State of Virginia and erected under authority of that State, a nuisance, and required its abatement. This was done, it is true, not because the State, in the absence of Congressional action, was in theory considered as without power to authorize the structure as built, but because Congress had in fact legislated in such a way as to the free navigation of the Ohio River, that the State legislation affecting such navigation was invalid. The specific Congressional action upon which the majority of the Court relied in their opinion, was, that ports of entry had been established above the bridge, vessels had been licensed to sail upon the river, duties had been imposed upon the officers of vessels, and a compact for the free navigation of the river entered into between Virginia and Kentucky, had been sanctioned at the time of the admission of the former State into the Union.

It is only necessary to point out that if such general Congressional action had been maintained by the Court, through later years, as sufficient of a regulation of the specific subject to oust State action in the premises, comparatively little power would remain in the States to-day over even their purely internal commerce, connected as the avenues of such commerce are, with those leading to other States. In the natural and legitimate growth of the States during the last twenty-five years, bridges have been built below Federal ports of entry, totally cutting off access by sailing vessels to points above them; vessels of the United States enjoying coasting and river licenses have been prevented from sailing to such points, and the free navigation of streams having outlets to other States and to foreign ports, has not been maintained, as such "free navigation" was defined in the *Wheeling Bridge* case. Much of this has been done without Federal authority, and to the great advantage of the people of the States and the strength-

ening of their several governments. It has been so done because the Supreme Court, in the evolution of its thought, has established better and broader doctrines as to State control over the avenues of commerce, than those laid down by Justice McLEAN in the *Wheeling Bridge* case.

In the Chestnut Street Bridge case, *Gilman v. Philadelphia* (1865), 3 Wall. (70 U. S.) 715, the Court, practically receding from the postulates of the *Wheeling Bridge* case to that extent, declared that general Congressional action establishing a port of entry above the site of a proposed bridge on the Schuylkill River, and the licensing of vessels to carry on the coasting trade to and from the port, was not sufficient legislation on the subject to negative the right of the State to authorize the erection of the bridge, although the bridge when built would prevent all access of the licensed vessels to points above it. The majority of the Court properly considered the State as entitled to control its own avenues of commerce, and with a prescient, practical sense, refused to limit the State in establishing new avenues of land as well as water communication within its borders, so long as Congress had not limited it either by specific laws or by a definite policy of action. Had the State of Pennsylvania been declared incompetent to bridge the Schuylkill at West Philadelphia, because a few vessels of National register had previously been accustomed to drop their anchors higher up the stream, a large part of the legitimate State powers of internal improvement would, from that time, have been given over to Congress, to the very great detriment, as we must believe, of the public interest. The development of land communication by rail and road, necessitating the crossing of streams and affecting interstate and foreign commerce, would have been sacrificed to the masters of sailing vessels, or else all power, and not, as our system properly provides, merely controlling power over the subject, lodged in Congress.

Since this case, the Court has further receded from the doctrine once conceived to be established by the *Wheeling Bridge* case, that a general declaration of Congress as to the free navigation of a public stream within the Federal jurisdiction, prevented a State from bridging it or otherwise obstructing navi-

gation. In a series of cases, commencing with *Escanaba Co. v. Chicago* (1882), 107 U. S. 678, or perhaps with *Pound v. Turck* (1887), 95 Id. 459, and ending with *Willamette Iron Bridge Co. v. Hatch* (1887), 125 Id. 1, the Court has defined such phrases, as that a river shall be "a common highway and forever free," as referring not to physical obstructions, but to political regulations tending to hamper the freedom of commerce. Such phrases were considered by the Court in *Cardwell v. American Bridge Company* (1884), 113 U. S. 205, 212—

"As having but one object, namely, to insure a highway equally open to all, without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation," and "contemplated no other restriction upon the power of the State in authorizing the construction of bridges over them, whenever such construction would promote the convenience of the public."

In *Willamette Iron Bridge Co. v. Hatch*, the Court formally and finally abandoned all positions of the *Wheeling Bridge* case, tending to limit the control of the States over their highways by general declarations of Congress. It placed the decision in that case, upon grounds peculiar to it. The proper ground for the decision, was stated to be, that, the Court having original jurisdiction in consequence of a State being a party, and the plaintiff, by reason of its status, having the right to invoke and the Court to apply any law applicable to the case, State law, Federal law, or international law, the State of Pennsylvania was entitled by State and international law, and not by general Federal legislation, to have the Ohio River unobstructed by the bridge in question, until Congress should definitely act by legalizing the structure, as it in fact did. See 18 How. (59 U. S.) 421.

Another important service the Supreme Court has rendered to the States, is in the care with which, while giving due force to the commerce power of Congress, it has maintained the absolute supremacy of the States over their purely internal affairs, free from Federal interference. The decisions in *Wabash, St. Louis and Pacific Railway Company v. Illinois* (1886), 118 U. S. 557, and *Bowman v. Chicago and Northwestern Railway Company* (1887), 125 Id. 465, and in the many tax cases that have come before the Court in recent years, wherein broad

National doctrines have of necessity been expounded, must not blind us to the fact that the Court, by its record, is as true a conservator of the rights of the States, in itself abstaining, and in requiring Congress to abstain, from interference with matters purely of State cognizance, as in laying down wide limits of State action in the absence of Congressional action. It has established the exclusive control by the States over their non-navigable streams, and their navigable streams above the points where they are available for interstate traffic: *Veazie v. Moor* (1852), 14 How. (55 U. S.) 568. It has declined to interfere with State policies, as to interstate industries not strictly commercial in character, as in the cases establishing that the States may determine upon what terms foreign insurance companies, mining companies and the like may do business within their borders: *Paul v. Virginia* (1868), 8 Wall. (75 U. S.) 168; *Ducat v. Chicago* (1870), 10 Id. (77 U. S.) 410; *Liverpool Insurance Company v. Massachusetts* (1870), Id. 566; *Philadelphia Fire Association v. New York* (1886), 119 U. S. 110; *Pembina Consolidated Mining Company v. Pennsylvania* (1887), 125 Id. 181.

The absolute State jurisdiction over ferries, even at the boundaries of States, has been affirmed and reaffirmed: *Fanning v. Gregoire* (1853), 16 How. (57 U. S.) 524, 534; *Conway v. Taylor* (1861), 1 Black (66 U. S.) 603. The distinction between charges for wharfage, and taxation upon commerce as such, is an important gain towards a clear marking of the lines of State action: *Packet Company v. Keokuk* (1877), 95 U. S. 80; *Packet Company v. St. Louis* (1879), 100 Id. 423; *Packet Company v. Catlettsburg* (1881), 105 Id. 559.

State laws taxing the property of non-residents, where there is no discrimination because of non-residence and no element of a tax on interstate traffic as such is involved, have always been sustained. Several interesting recent cases deserve to be noticed. In *Brown v. Houston*, *supra*, p. 742, it was held that coal, owned by citizens of Pennsylvania, but lying at the port of New Orleans, and sent there for sale, was taxable as property at that port, although, after arrival, it was sold in the boat without being landed, and for the purpose of being taken out of the country on a vessel bound for a foreign port. So, in *Coe v. Errol* (1885), 116 U. S. 517, logs lying at a shipping port in New

Hampshire, designed for transportation to another State, but not yet in transit, were held subject to taxation there.

The application by the Court in the *Trade-Mark Cases* (1879), 100 U. S. 82, of the doctrine of the exclusion of Federal authority from regulating commerce purely internal in kind, was perhaps a surprise to some, but it was only in the line of the earlier conservative decision in *United States v. De Witt* (1869), 9 Wall. (76 U. S.) 41, where it was held that an Act of Congress regulating the vendible quality of illuminating oils was not enforceable within State limits.

Much of the criticism that has been made upon the attitude of the Court, charging it with a failure to apprehend the true importance of the State governments as such, it will now be seen, is somewhat unreflecting, at least so far as the law of the commerce clause is concerned. That clause has been selected by way of illustration, because, of all the powers in the National grant, it is the one where we might least expect recognition of State authority. There are, of course, a few still among us who, with backward glance, like Justice DANIEL in his time, fail to see in its full outline the Nation that was potentially created when the Constitution was made, and which it has been the high destiny of the Supreme Court of the United States to disclose to the world. To these and such as these, whose primary instinct is jealousy of National power, all power but that of the States, is suggestive of usurpation, and the true significance of the development of the Constitutional law of the United States, whether in the line of expansion or of limitation, is not to be shown. Happily, however, for the progress of ideas, "that bald sexton Time" is fast gathering them to their fathers.

A. H. WINTERSTEEN.

Philadelphia.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

SMALL v. SMALL.

In Pennsylvania, a wife may not sue her husband, directly and in her own name, for money received by him from her separate estate.

The Married Persons' Property Act of 1887, gives to a wife, in her own name, those rights of action only, which are necessarily incident to her rights of ownership of property and capacity to contract as if she were a *feme sole*.

Error to the Court of Common Pleas of Franklin County.

Assumpsit by Lavinia Small against David W. Small, her husband, in which action judgment was rendered against the husband, and he appealed.

The power of the wife to bring such a suit in her own name, depended upon—

An Act relating to husband and wife, defining the rights to and power over their property, to make conveyances and contracts, authorizing them to sue, and be sued, upon their contracts, and for torts, and defining the interest of husband and wife in the estate of each, by will or otherwise.

SECTION 1. *Be it enacted, etc.*, That hereafter, marriage shall not be held to impose any disability on, or incapacity in, a married woman, as to the acquisition, ownership, possession, control, use, or disposition of property of any kind, in any trade or business in which she may engage, or for necessities, and for the use, enjoyment, and improvement of her separate estate, real and personal, or her right and power to make contracts of any kind, and to give obligations binding herself therefor; but every married woman shall have the same right to acquire, hold, possess, improve, control, use, or dispose of her property, real and personal, in possession or expectancy, in the same manner as if she were a *feme sole*, without the intervention of any trustee, and with all the rights and liabilities incident thereto, except as herein provided, as if she were not married; and property of every kind, owned, acquired, or earned by a woman, before or during her marriage, shall belong to her, and not to her husband, or his creditors: *Provided, however*, That a married woman shall have no power to mortgage, or convey her real estate, unless her husband join in such mortgage, or conveyance.

SECTION 2. A married woman shall be capable of entering into, and rendering herself liable upon any contract, relating to any trade, or business, in which she may engage, or for necessities, and for the use, enjoyment, and improvement of her separate estate, and for suing and being sued, either upon such contracts, or for torts done to or committed by her, in all respects as if she were a *feme sole*, and her husband need not be joined with her, as plaintiff, or defendant, or be made a party to any action, suit, or legal proceeding of any kind, brought by, or against, her, in her individual right, and any debt, damages, or costs, recovered by her in any such action, suit, or proceeding, shall be her separate property, and any debt, damages, or costs, recovered against her in any such action, suit, or other proceeding, shall be payable out of her separate property, and not otherwise: *Provided*,

However, That nothing in this, or the preceding section, shall enable a married woman to become accommodation endorser, guarantor, or surety, for another.

SECTION 3. A married woman may make, execute, and deliver leases of her property, real and personal, and assignments, transfers, and sales of her separate personal property, and notes, bills, drafts, bonds, or obligations of any kind, and appoint attorneys to act for her, and it shall not be necessary for her husband to be made a party thereto, or joined therein.

SECTION 4. Husband and wife shall have the same civil remedies upon contracts in their own name and right, against all persons for the protection and recovery of their separate property, as unmarried persons.

SECTION 5. A married woman may dispose of her property, real and personal, by last will and testament, in writing, signed by her, or manifested by her mark or cross, made by her at the end thereof, in the same manner as if she were unmarried.

SECTION 6. This Act shall be known as "The Married Persons' Property Act."

SECTION 7. All acts inconsistent herewith, are hereby repealed. [Approved, June 3, 1887: P. L. 332.]

F. M. Kimmel and *W. R. Gillan*, for David W. Small.

Alexander Stewart and *O. C. Bowers*, for Lavinia Small.

MITCHELL, J., October 7, 1889. The single question presented is whether the Act of June 3, 1887 (P. L. 332), known as the "Married Persons' Property Act," authorizes a wife to sue her husband, directly, and in her own name, for money received by him from her separate estate.

Section four of the Act reads: [*vide supra*.] This language is general and unlimited. It makes no exception of an action against each other, and, taken by itself, its natural meaning is, perhaps, broad enough to include them without straining. But no rule of judicial interpretation is wiser or better settled than that which prohibits the taking of a single sentence, even though it forms a separate section of a statute, and construing it apart from the context, or without regard to the subject matter, and the general purpose sought to be accomplished. The present Act gives notable warning of the danger of such a course. Though not long, it is extremely intricate, and confused, if not contradictory. The first two sections make the same general grant at least four times, and each time with such variations that, though the general purpose is clear, very difficult questions may be raised as to the exact limits of the powers conferred.

Section three then proceeds to grant certain specific powers,

all of which, except for the doubt raised by this section itself, are clearly conferred by parts of the language of the preceding sections. It is a striking example of what is not infrequent in legislation, and the avoidance of which, I may say in passing, is by no means the least difficult of judicial accomplishments, the desire to enforce and emphasize the intention, leading to a second expression, which tends to becloud the first. Next is the fourth section, with which we are immediately concerned. Like the preceding section, it seems to be the product of a desire to emphasize a grant already abundantly implied in the control over property, "with all the rights and liabilities incident thereto," of the first section, and expressly given in the capacity to sue and be sued, provided by the second. Can it be fairly construed to mean more than this?

The general purpose of the Act is clear enough. It is to give married women the same freedom of ownership, control, and disposition of their property and earnings, and the rights and remedies incident thereto, that men have over theirs. It accordingly confers upon them the absolute power of disposition of their personal property, but requires the joining of the husband in mortgage or conveyance of real estate. The rights of action, conferred by implication, in section one, as already said, or expressly, in the latter sections, are given as means of maintaining the rights of property conferred by the sections themselves, and there is nowhere any indication of a purpose to extend them beyond their character, as a necessary incident for that purpose. Still less is there any indication of a purpose to extend the rights or powers of the husband, which a right to sue the wife, under the construction of section four contended for, would certainly do.

If we look not only at the general intent of the Act, but more closely at the language used, we are led to the same result. The purpose is not only expressed broadly, in apt language, once, but is repeated and reiterated with superabundant caution. In this varied and detailed consideration, it is impossible to suppose that so important a branch of the subject, as the right of action between husband and wife should not have been thought of, or being thought of, should not

have been granted in unequivocal terms, if intended to be granted at all. To legislators versed in the principles of the common law, it would immediately suggest itself as a distinct and momentous departure from the legal policy of centuries, which ordinary phraseology, however general, would not commonly be understood to intend, and it is inconceivable that, under such circumstances, it should be granted obscurely and by implication. As said by WOODWARD, J., in *Ritter v. Ritter* (1858), 31 Pa. 398—

“ If the Legislature meant that such actions as the present should be sustained, they had command of a very copious language in which to express their will.”

The Acts of April 11, 1856 (P. L. 315), and June 11, 1879 (P. L. 126), make provisions for actions by the wife against the husband in case of desertion, or neglect, or refusal to support, and we conclude that the Legislature thought this remedy ample, without extending it to suits between parties living amicably together in the marital relation.

This view is confirmed almost to a demonstration by the legislative history of the Act of 1887. The fourth section follows closely the English Married Women's Property Act of 1882 (45 and 46 Vict., c 75; Law Rep. Stat. 1882, p. 458), and, as originally introduced into the Senate, it provided, as that Act does, that—

“ Husband and wife shall have the same civil remedies upon contracts in their own name and right against all persons, including each other,” etc. (Legislative Record, 1887, p. 896)

This specific provision, which put the change in the previous law into that precise, definite, and unquestionable form which its importance demanded, was struck out, and the section passed without it. The inference from this action is irresistible, that the Legislature did not intend that actions between husband and wife, while living together, should be authorized.

It is argued that as the language is the same with respect to both husband and wife, it must authorize both or neither to sue the other; and, therefore, if it does not authorize the husband to sue the wife, we shall have the absurd result that the Legislature has solemnly conferred upon a married man the same right to sue strangers that an unmarried man possesses.

This is not without plausibility, and, if the section stood alone, would be of much force; but taken in its connection, it is an additional link in the argument that the husband's rights, except as involved in the regulation of his wife's, were not intended to be affected at all. The same may be said of the phrase "their separate property" in the same section. What is a husband's separate property? In language of the law, such a phrase is as absurd as the result pictured in the argument referred to. In truth the real explanation of both phrases, entirely unsuitable as they stand, is the failure to notice the effect of striking out the words "including each other," contained in the Act as originally introduced. With these words left in, the absurdity, as to suits by the husband, disappears, and the phrase "separate property," though not elegant as to legal style, is clear and definite in its meaning. There are several other changes, from the first draft, to the Act, as finally passed,—such as the striking out of section three, of the power to convey real estate without the husband joining, and the attaching of a proviso to the contrary to section one, etc.,—which indicate that the Act, as originally introduced, was much more radical in its changes than the Legislature was willing to pass; and we think it clear that the authority to sue each other, was one of the proposed changes which were refused a sanction.

One further consideration which may be adverted to, is the hardship and injustice which might arise as to past matters, by the grant of a universal and unrestricted right to sue upon a claim which the defendant may have had no reason to expect or foresee. The present case affords a striking example of these dangers. Of course, I do not speak of the moral merits of the case, for of these I know nothing, but of the legal possibilities. The husband received this money about 1856. There is no claim that he received it against the wife's will, nor any evidence that it was not used for their mutual benefit in the support of the family. Thirty years after it had been thus spent, presumably with her entire approval, a difference or quarrel occurs, and the wife sues to recover the money. No promise to pay is proved or pretended. The plaintiff rests on the presumption that her husband received

it as trustee for her, and, as her counsel truly say, "the burden is upon him to prove the contrary." Yet the very same Legislature that is claimed to have put this action and its consequent burden upon him, in a most ably drafted and elaborately considered statute on the competency of witnesses, expressly denied him the right of testifying that the money was given to him by her, or that he spent it at her direction. This of course, is a legislative rather than a judicial argument, but it adds force to the considerations which induce the Court to say now, as it has said with marked emphasis heretofore, that so great a change in the policy of the law upon a subject that may come home to every household in the Commonwealth, should not rest on inference, or implication from general words, but should appear by the explicit and unquestionable mandate of the Legislature; and when the change is made, if at all, it should be done in such form as to guard against the possibilities of injustice in regard to past transactions, such as are suggested in the present case.

Judgment reversed.

By the Married Women's Property Act of 1882 (45 and 46 Vic., c. 75), every "contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to, and to bind, her separate property, unless the contrary be shown."

By Section twelve, it is enacted, that "Every woman shall have, in her own name, against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*."

In *Butler v. Butler* (1885), L. R. 14 Q. B. D. 831, an action was brought by a husband against his wife, to recover £1,848 out of her separate estate, for money paid in her behalf.

WILLS, J. "Now, I take it to be clear that with respect to the wife's separate estate, free from restraint upon anticipation, she is competent to contract, and to contract with her own hus-

band. It is a remarkable instance of legislation by judicial decision, whereby the old common law has been entirely abrogated and the power of the wife to contract with her husband, has been established, and upon a contract of loan, the wife may sue the husband."

Therefore this case rules that a husband may maintain his action against his wife, and may charge her separate property for money lent by him to her after marriage, and for money paid by him for her after marriage at her request; but he is not entitled, since the above Act, to maintain an action against her for money lent to her, or money paid to her, at her request, before marriage. This ruling was sustained on appeal (1885), L. R. 16 Q. B. D. 374, in learned opinions by the Master of the Rolls (Lord ESHER), and Mr. Justice COTTON.

In *Countz v. Markling* (1875), 30 Ark. 17, a judgment confessed by a

husband in favor of his wife was held to be void and was quashed on *certiorari*.

[The Civil Code of Arkansas (§ 42 and Act April 28, 1873, §§ 4, 8, 9; Dig. 1884, p. 975) provides, that, "Where a married woman is a party, her husband must be joined with her, except in the following cases: "*First*. She may be sued alone, upon contracts made by her, in respect to her sole and separate property, or in respect of any trade, or business, carried on by her, under any statute of this State. "*Second*. She may maintain an action in her own name, for, or on account of, her sole or separate estate, or property, or for damages against any person, or body corporate, for any injury to her person, character, or property. "*Third*. Where the action is between herself and her husband, she may sue, and be sued, alone."

[In *Alabama*, under Statute Feb. 28, 1887, § 7 (Code, p. 526, § 2347), "The wife must sue alone, at law or in equity, upon all contracts made by or with her, or for the recovery of her separate property, or for injuries to such property, or for its rents, income, or profits, or for all injuries to her person or reputation; and upon all contracts made by her, or engagements into which she enters, and for all torts committed by her, she must be sued as if she were *sole*."

[In *Arizona*, by Rev. Stat. 1887, p. 169, § 683, "When a married woman is a party, her husband shall be joined with her, except that—1. Where the action concerns her separate property, she may sue, or be sued, alone. 2. When the action is between herself and her husband, she may sue, or be sued, alone."

And by the same Rev. Stat. 1887, p. 373, § 2104 (Act Feb. 28, 1887), "Hereafter, married women of the age of twenty-one years and upwards shall have the same legal rights as men of the age of twenty-one years and upwards, except the right of suffrage and of hold-

ing office, and except the right to make contracts binding the common property of the husband and wife; and shall be subject to the same legal liabilities as men of the age of twenty-one years and upwards, but no part of this section shall be so construed as to prevent women from voting at school elections, or hold office as school trustees, as now provided by law."

[In *California*, the provisions of the Civil Code are to the same effect as those of *Arizona* (Code of Civil Procedure, 1885, p. 110, § 370)—"When a married woman is a party, her husband must be joined with her, except: 1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone. 2. When the action is between herself and her husband, she may sue and be sued alone. 3. When she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing, entered into between them, she may sue and be sued alone."

[*Wilson v. Wilson* (1868), 36 Cal. 447, was an action by a married woman against her husband, for the recovery of two promissory notes executed before their marriage. The right of action was sustained under the section cited above, SAWYER, C. J. (now U. S. Circuit Judge), saying: "There is no limitation as to the kind of actions that may be maintained 'between herself and her husband;' and section 395, as amended in 1865-6 [§ 1881 of the Civil Code, p. 621], authorizes the husband and wife to testify on their own behalf, or on behalf of each other, as witnesses in actions between themselves, *except in actions of divorce*. This provision contemplates that there may be actions between husband and wife, other than those relating to divorces. What are they, unless relating to rights of property? Disputes with respect to property may arise between them when the separate existence

of the wife, and a separate right of property is recognized at law, as in this State, as well as other matters; and when they do arise, there is as great necessity for a judicial determination of the questions, as when they arise between other parties. A litigation of the kind between husband and wife may be unseemly and abhorrent to our ideas of propriety, but a litigation in one form can be no more so than in another, and no more so than the necessity itself which gives rise to the litigation. The present policy of the law is to recognize the separate legal and civil existence of the wife, and separate rights of property, and the very recognition by the law of such separate existence, and rights at law, as well as in equity, to hold and enjoy separate property, involves a necessity for opening the doors of the judicial tribunals to her, in order that the rights guaranteed to her may be protected and enforced. The right to bring actions is accordingly recognized in the sections referred to, and no limitation is imposed as to the character of the actions:" pp. 446-7.

[Conversely, the husband successfully required his wife to reconvey his real estate, which he had conveyed to her in lieu of making a devise, on her promise to reconvey at his request: *Brison v. Brison* (1888), 75 Cal. 525.

[Another point in *Wilson v. Wilson*, was equally interesting. The ordinary period of limitation had expired before the wife began her action. The Statute of Limitations of 1850, as amended in 1863 (Code Civ. Procedure p. 102, § 352), provides, that: "If a person entitled to bring an action mentioned in Chapter III, of this title [*i. e.*, other than for the recovery of real property, though the provision in regard to realty is to the same effect: *Id.* p. 94 § 328], be, at the time the cause of action accrued, either: 4. A married woman, and her husband be a necessary

party with her in commencing such action; The time of such disability is not a part of the time limited for the commencement of the action." The words in italics were added by the amendatory act, and § 370 (*supra*) being permissive in allowing the wife to sue alone, (*Corcoran v. Doll* (1867), 32 Cal. 83, 90), the running of the statute would have been suspended but for the words added in 1863: *Wilson v. Wilson* (1868), 36 Cal. 447, 451.

[In Colorado, by the Civil Code of 1887 (chap. 1, § 6)—"A married woman may sue, and be sued in all matters, the same as if she were *sole*." The Gen. Stat. 1883 (p. 695, § 2268), had restricted the power to cases, "in all matters having relation to her property, person, or reputation," but § 2279 was identical with the provisions of the Civil Code, *supra*. Section 2271 of the Gen. Stat. 1883 also provided—"Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account, and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name; and she may sue and be sued, as if *sole*, in regard to her trade, business, labor, services, and earnings, and her property acquired by trade, business, services, and the proceeds thereof, may be taken on any execution against her."

[Colorado Limitation Act also provides (Gen. Stat., p. 673, § 2177)—"If any person, entitled to bring any of the actions before mentioned in this Act [*i. e.*, personal actions, and bills founded upon fraud or trust], shall, at the time when the cause of action accrues, be within the age of twenty-one years, or a married woman, insane, imprisoned, or absent from the United States, such person may bring the said actions within the time in this chapter respective'y

limited after the disability shall be removed."

In Connecticut, Gen. Stat. 1888 (p. 234) provide—"§ 986. When a married woman shall carry on any business, and any right of action shall accrue to her therefrom, she may sue upon the same, as if she were unmarried." In *Rockwell v. Clark* (1877), 44 Conn. 534, this word "may" was particularly observed, and the husband was not allowed to sue, as "trustee," upon his wife's trade contracts. "It confers a right to sue, which did not exist before; not in addition to the right of the [husband, under § 2792, as] trustee, but in exclusion of it; and that it is a statute for simplification:" PARDEE, J., Id. 536.

In *Adams v. Adams* (1883), 51 Conn. 135, suit was brought to set aside conveyances of real estate by a woman who had been abandoned by her husband. The Gen. Stat. (1888, § 2794) provided that "When any man shall have abandoned his wife, he shall be deemed to have abandoned his right to the custody and control of her property and the rents and income thereof; and said property shall thereupon immediately vest in her and be her sole estate, and she may, during the continuance of such abandonment, sue and be sued, and transact business in her own name, as a *feme sole*." The Court held she could bring such a suit, under the statute, against her husband.

[*Spitz's Appeal* (1888), 56 Conn. 184, arose after the passage of the Act of 1877 (Gen. Stat. 1888, p. 610), which provides—"§ 2796. In case of marriages on or after April 20, 1877, neither husband nor wife shall acquire, by force of the marriage, any right to or interest in any property held by the other before, or acquired after, such marriage, except as to the share of the survivor in the property, as provided by law. The separate earnings of the wife shall be her sole property. She shall have power

to make contracts with third persons, and to convey to them her real and personal estate, as if unmarried. Her property shall be liable to be taken for her debts, except when exempt from execution, but in no case shall be liable to be taken for the debts of her husband. And the husband shall not be liable for her debts contracted before marriage, nor upon her contracts made after marriage, except as provided in the succeeding section." The marriage occurred in January, 1878, and the wife loaned large sums to her husband, upon his promise to repay with interest. The husband afterward failed and made an assignment in insolvency and the wife was both allowed to claim a dividend and to establish her claim by her own oath. The statute was admittedly silent, "but no intention to impair her prior right to enter into such contracts, is implied by such silence. The statute was not designed to abridge any rights of property which the wife had before its enactment, but, on the contrary, its object was to invest her with the complete ownership and control of the property which she had when married, or might thereafter acquire:" BEARDSLEY, J., p. 186.

[The Gen. Stat. Conn. (p. 611), also provide—"§ 2798. In case of marriages existing prior to April 20, 1877, the provisions of the two preceding sections shall apply, whenever any husband and wife have entered, or shall hereafter enter, during marriage, into a written contract with each other for the mutual abandonment of all rights of either in the property of the other, under prior statutes, or at common law and for the acceptance instead thereof of the rights in said sections provided, which contract shall be recorded in the Court of Probate of the district, and in the town clerk's office of the town in which they reside. And thereupon, said provisions shall apply to such marriage."

[In Dakota, under Gen. Stat. 1887, c. 98, Sec. 1 (Compiled L. 1887, p. 554) —“ § 2600. From and after the passage of this Act, woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity, for redress and protection, that her husband has to appeal in his own name alone; *provided*, this Act shall not confer upon the wife the right to vote or hold office, except as otherwise provided by law.”

[The right of suits between married persons is expressly recognized in chap. 211 (Compiled L. 1887)—“ § 5260. No person offered as a witness in any action, or special proceeding, in any court, or before any officer, or person having authority to examine witnesses, or hear evidence, shall be excluded, or excused, by reason of such person's interest in the event of the action or special proceeding; or because such person is a party thereto; or because such person is a husband or wife of a party thereto, or of any person in whose behalf such action or special proceeding is brought, prosecuted, opposed, or defended, except as hereinafter provided: 1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage, or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this subdivision does not apply to a civil action, or proceeding, by one against the other, nor to a criminal action, or proceeding for a crime committed by one against the other.”

[By “ § 4873. When a married woman is a party, her appearance, the prosecution or defense of the action, and the joinder with her, of any other person or party, must be governed by the same rules as if she were single.” *Id.* p. 828.

[The Delaware Act of April 9, 1873 (chap. 550, vol. 14, Laws; Rev. Stat. 1874, p. 479), makes all of her property and wages her sole and separate estate, and provides—“ SEC. 4. That any married woman may prosecute and defend suits at law, or in equity, for the preservation and protection of her property, as if unmarried, or may do it jointly with her husband, but he alone cannot maintain an action, representing his wife's property; and it shall be lawful for any married woman to make any and all manner of contracts necessary to be made with respect to her own property, and suits may be maintained on such contracts, as though the party making them was a *feme sole*.”

[Florida, by Act of March 6, 1845 (Digest, p. 755), makes the wife's property “separate and independent,” but “in the care and management of her husband,” and then provides—“ SEC. 5. Any married woman having separate and independent title to property, under and by virtue of Sections 3 and 4 of this chapter, shall not be entitled to sue her husband for the rent, hire, issues, proceeds, or profits of said property, nor shall the husband charge for his management and care of the property of the wife.”

In Georgia, by § 1774, Code of 1882, p. 408—“A married woman may sue and be sued, without joining her husband in the action, in any of the courts of this State, in the following cases: 1st, when the action concerns her separate property; 2d, when the action is between herself and husband; 3d, when she is living separate and apart from her husband. In no case shall she be re-

quired to prosecute, or defend, by a guardian or next friend."

[In Idaho, by Rev. Stat. 1887, p. 441—§ 4093. When a married woman is a party [to a civil action], her husband must be joined with her: except—1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone: 2. When the action is between herself and her husband, she may sue and be sued alone: 3. When she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone.

[In case of an action for the recovery of real property, where her husband is a necessary party, the wife has five years after discoverture, to commence her action, before the bar of the statute will apply, as provided in California, *supra*, p. 755.

In *Chestnut v. Chestnut* (1875), 77 Ill. 346, it was held that a proceeding by *sci. fa.*, commenced by a wife against her husband, upon a supposed record of an order for the payment of temporary alimony, could not be sustained, as there was no statute in the State abrogating the common law in this respect.

["An Act to revise the law in relation to husband and wife," approved March 30, 1874 (R. S. p. 576), provides—"§ 10. Should either husband, or wife, unlawfully obtain, or retain, possession, or control, of property belonging to the other, either before, or after, marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner, and to the same extent, as if they were unmarried."

[Commenting upon this statute, HIGBEE, P. J. (*Larison v. Larison* (1881), 9 Bradw. (Ill.) 27, 31), said—"It is a well settled rule of law, that where a new remedy is given by statute, it does not

take away the existing remedy, unless the statute expressly so provides; and it is insisted by defendant in error that, as the remedy for an injury to the property of a married woman by her husband, was in equity at common law, this section is to be treated as cumulative, and as giving a new remedy without taking away the old. Had the rights of the parties remained the same as they were at common law, such would have been the correct construction of this section; but this statute does more than give a new remedy—it changes the entire rights of the parties, it removes the disability of marriage, and creates the wife a *feme sole* for the purpose of acquiring, managing, and disposing of property; and of contracting and being contracted with; confers upon her the legal title to her property, recognizes her separate existence, and gives her a legal standing in the courts of law, which she did not before possess, and these new rights must be enforced in a court of law, the same as if she were a *feme sole*. * * * * * Her right to the property is a naked, legal right, and a court of law is fully adequate to its protection. Under such circumstances, the use and enjoyment of the property between husband and wife, while residing together as such, is not the proper subject for the interference of a court of chancery, unless to prevent irreparable injury." A bill filed by the wife was accordingly dismissed.

["An Act in regard to Evidence and Depositions in Civil Cases," approved March 29, 1872 (Laws of 1871-2, p. 405), as amended by an Act approved January 21, 1874 (Laws of 1873-4, p. 98, § 1)—"No husband, or wife, shall, by virtue of Section One of this Act, be rendered competent to testify for, or against, each other, as to any transaction, or conversation, occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in

cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong, or injury, done by one to the other, or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except, also, in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be insured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions, where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this Act: *Provided*, that nothing in this section contained, shall be construed to authorize, or permit, any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits and causes between such husband and wife."

[In *Thomas v. Mueller* (1883), 106 Ill. 41, WALKER, J., in delivering the opinion of the Court, said: "As to the management and control of her property, the wife is almost entirely emancipated from all power of the husband. She may buy and sell property, and sue and be sued in reference to it, independent of his control, and the eighth section, in terms, limits their power to sue each other for compensation for labor performed or services rendered for the other, whether in the management of property or otherwise. From this it is manifest that the Legislature intended to remove all restrictions on their power, to contract with each other, and to en-

able them to sue each other on such contracts, in the same manner as if they were not married." The Court sustained a judgment confessed to the wife by the husband, and dismissed a creditor's bill which had been filed for the setting aside of the confessed judgment as an obstruction to the collection of the creditor's debt due from the husband.

[Indiana Rev. Stat. 1888 (vol. 1, ch. 2), provide that—"§ 254. A married woman may sue alone: *First*. When the action concerns her separate property. *Second*. When the action is between herself and her husband; but in no case shall she be required to sue or defend by guardian or next friend, except she be under the age of twenty-one years."

[And by "§ 296. Any person, being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed." This section was defined by the Code of Civil Procedure (Rev. Stat. 1876, vol. 2, p. 313), thus—"§ 797. In the construction of this Act, the following rules shall be observed, when consistent with the context: * * * the phrase 'under legal disabilities,' includes married women, * * ." Under this section, *Bauman v. Grubbs* (1866), 26 Ind. 419, and *Harlen v. Watson* (1878), 63 Id. 143, were decided. But the Civil Code of 1881 (Rev. Stat. 1888, § 1285), in re-enacting this section, omitted the words "married women," as was done in California: *v. p.* 755, *supra*.

[*Harrell v. Harrell* was a case decided in the Supreme Court of Indiana, January 24, 1889, in which the husband sued his wife to recover money loaned, ELLIOTT, C. J., saying: "There is no reason why she may not borrow money from her husband, to enable her to conduct her separate business, and prevent the sacrifice of her property. If she does voluntarily borrow from him under

an express contract, and there is neither fraud nor oppression, nor any injustice, no valid reason exists why she should not be compelled to pay him, for he is her creditor. The relationship between the parties does, however, exert an important influence upon the contracts of the wife. It is doubtless incumbent on the husband to show an express contract, and its consideration, as well as good faith and voluntary action. We very much doubt whether he could recover without alleging and proving the express contract, and its consideration, in any case. Certainly he could not recover money placed in the hands of his wife, without showing the purpose for which she obtained it, and an express promise to repay it. * * * Where there is full consideration yielded by the husband, entire good faith, an express contract, and the money is received by the wife for the benefit of her separate estate, and to prevent injury to that estate, or loss to the wife, the courts cannot do otherwise than uphold the claim of which the contract forms the element."

[*Crater v. Crater* (decided April 27, 1889), in the same State, was an action by the wife against her husband, in the court below, to recover the possession of land. As a contract made in 1866, by a married woman, to give her husband half her land, to be held by them as joint tenants, in consideration of his agreement to discharge a lien thereon, was void, the Court held that such a contract, and the performance thereof on the husband's part, were no defence to ejectment by the wife. COFFEY, J., said: "It is settled law in this State, that the wife may sue the husband in relation to her separate property: *Wilkins v. Miller* (1857), 9 Ind. 100; *Scott v. Scott* (1859), 13 Id. 225. * * * In New York, under statutes very similar to our own, it was held that the wife might maintain an action of eject-

ment against her husband for her separate real estate: *Wood v. Wood* (1881), 83 N. Y. 575. It is our opinion that the wife, in this State, may maintain an action of ejectment against her husband to recover the possession of her separate real estate."

[The Revised Code of Iowa (1888) provides that—"§ 2562. A married woman may, in all cases, sue and be sued, without joining her husband with her, to the same extent as if she were unmarried, and an attachment, or judgment, in such action shall be entered by, or against, her as if she were a single woman."

[And by "§ 3641. Neither husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other; or in a civil action or proceeding one against the other, but they may in all civil and criminal cases be witnesses for each other."

In *Peters v. Peters* (1875), 42 Iowa 182, an action was brought by the wife against her husband, for damages on account of batteries and assaults. But the right of action was denied by the Supreme Court. The sections of the code mainly relied upon by the defence were—

§ 2211. "A wife may receive the wages of her personal labor, and maintain an action therefor, in her own name, and hold the same in her own right; and she may prosecute and defend all actions, at law or in equity, for the preservation and protection of her rights and property, as if unmarried."

§ 2204. "Should either the husband, or wife, obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried."

The argument, as ingenious as it was

fallacious, tried to express that if the wife could sue the husband for her property, the right of the wife to sue the husband for a tort exists, for that right was property; therefore the wife might maintain an action against the husband for a tort.

In *Johnson v. Barnes* (1886), 69 Iowa 641, a husband abandoned his wife and child; the wife maintained the child and brought an action against the husband to recover, for such expenses, but *SEEVERS, J.*, said: "The Code, § 2214, provides that 'the expenses of the family, and the education of the children, are chargeable upon the property of both the husband and wife, or either of them, and, in relation thereto, they may be sued jointly, or separately.' We do not think such inquiries can, or should be, entered into, but that, under the statute, both parents are bound to contribute to the support of the children, and that when one does so, a promise to pay, in favor of one and against the other, cannot be implied."

[In Kansas (Comp. Laws, 1885, ch. 62, p. 536), by "§ 3349. A woman, while married, may sue and be sued, in the same manner as if she were unmarried." And (*Id.* ch. 80, p. 609) by "§ 3822. A married woman may sue and be sued in the same manner as if she were unmarried."

[The Kentucky Act relating to Practice in Civil Cases (ed. 1888, p. 33) provides that—"§ 34. In actions between husband and wife; in actions concerning her separate property; and in actions concerning her general property in which he refuses to unite, she may sue or be sued alone."

[By Gen. Stat. Ky. (chap. 71, Art. 1, 1887, p. 885)—"§ 2. If, at the time the right of any person to bring an action for the recovery of real property first accrued, such person was an infant, married woman, or of unsound mind, then such person, or the person claiming

through him, may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed."

[And by (chap. 71, Art. II., p. 888) "§ 1. No action at law, or in equity, shall be brought, under or by virtue of an adverse, interfering entry, survey, or patent, to recover the title or possession of land from an occupant, where he, or the person under whom he claims, has a connected title thereto, in law or equity, deducible of record from the commonwealth, and has, or shall have had, an actual occupancy of the same by settlement thereon, under such title, for seven years before the commencement of the action; and such possession of land shall bar and toll the right of entry into such land by any person, under an adverse title or claim, and such possession as will bar the right to recover the same, shall vest the title in the occupant or vendee. This limitation shall not apply to a person who is an infant, a married woman of unsound mind, or out of the United States in the employment of the United States, or of this State, at the time the cause of action accrued, nor until seven years after the removal of such disability; but the disability of one of several claimants shall save only his own right, and not that of another."

[In Louisiana (Rev. Civil Code 1889, ch. 5, Art. 121, p. 65), "The wife cannot appear in court without the authority of her husband, although she may be a public merchant, or possess her property separate from her husband."

[And (Art. 124, p. 65), "If the husband refuses to empower his wife to appear in court, the judge may give such authority."

[And (Art. 132, p. 67), "If the husband is under interdiction [*i.e.*, declared to be in an habitual state of imbecility, insanity, or madness: *Id.* Art. 389], or absent, the judge may, when satisfied of

the fact, authorize the wife to sue or be sued, or to make contracts."

[And also (Art. 123, p. 65), "The woman separated from bed and board, has no need, in any case, of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains."

[In *Hawthorne v. Clark* (1887), 39 La. An. 678, William Clark conveyed certain immovable property to Mary Quirk, and a few weeks later, married her. The parties subsequently separated, and Clark made a simulated title to his son-in-law. The suit was dismissed, and the dismissal was affirmed, TODD, J., saying: "During the existence of the marriage, Clark could bring no suit against his wife, to have the sale annulled."

In *Abbott v. Abbott* (1877), 67 Me. 304, an action was brought by a wife, after divorce, against her husband, for an assault committed during coverture. PETERS, J. "Can an action of tort for such an injury, instituted after divorce, be sustained by her against her former husband? It cannot be maintained. The theory upon which the present action is sought to be maintained, is that coverture merely suspends the remedy of the wife against her husband. The doctrine advocated finds no support from any of the principles of the common law. By the earliest edicts of the courts, he had a right to strike her as a punishment for her misconduct, and her only remedy was that 'she hath retaliation to beat him again if she dare.' Chancellor KENT lays down the doctrine, not contradicted, or challenged in any of the editions of his Commentaries, that 'as the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him considerable and reasonable superiority and control over her person, and he may even put gentle restraints

upon her liberty, if her conduct be such as to require it, unless he renounces that control by articles of separation, or it be taken from him by a qualified divorce': 2 Kent Comm. 180. For many years a gradual evolution of the law has been going on, for the amelioration of the married woman's condition, until it is now, undoubtedly, the law of England and of all the American States, that the husband has no right to strike his wife, or to punish her, under any circumstances or provocation whatever. * * * We believe a rule which forbids all such opportunities for law suits and speculations to be wise and salutary and to stand on the solid foundations of the law. * * * She has the privilege of the writ of *habeas corpus*, if unlawfully restrained; as a last resort, she can prosecute a suit for divorce."

The same ruling was made in *Philips v. Barnet* (1870), L. R. 1 Q. B. D. 436; *Longendyke v. Longendyke* (1863), 44 Barb. (N. Y.) 366; *Schultz v. Schultz* (1882), 63 How. (Id.) 181, affirmed on appeal in 27 Hun. (Id.) 26 (1882), but reversed in the Court of Appeals (1882), 89 N. Y. 644.

In *Hobbs v. Hobbs* (1879), 70 Me. 381, an action of assumpsit was brought by a wife against her husband, upon an account annexed. APPLETON, C. J., said: "The question presented is, whether either party to the marriage contract can sue the other while the marriage relation subsists. By the Act of 1876, c. 112 (Rev. Stat. 1883, p. 524), 'She may prosecute and defend suits at law or in equity, either of tort or contract, in her own name, without the joinder of her husband, for the preservation and protection of her property and personal rights, or for the redress of her injuries, as if unmarried, or may do it jointly with her husband, and the husband shall not settle or discharge any such action, or cause of action, without the written consent of the wife.'

Under previous decisions of this Court, it has been held that neither husband or wife can sue the other directly in assumpsit."

In *Crowther v. Crowther* (1868), 55 Me. 358, the Court held that this statute was not intended to give such a right. The wife could not maintain an action against her husband during the existence of the marriage relation.

[The wife not being allowed to sue the husband, the period of limitation is extended, by Rev. Stat. Maine (ed. 1883, p. 688, chap. 81,) "§ 88. If a person entitled to bring any of the aforesaid [*i.e.* personal] actions, is a minor, or married woman, insane, imprisoned, or without the limits of the United States, when the cause of action accrues, the action may be brought within the times limited herein, after the disability is removed." And also by (p. 824, chap. 105,) "7. When such right of entry, or action, first accrues, if the person entitled thereto is a minor, married woman, insane, imprisoned, or absent from the United States, he, or any one claiming under him, may make the entry, or bring the action, at any time within ten years after such disability is removed, notwithstanding twenty years have expired."

[After the dissolution of the marriage by divorce, the objection to the maintenance of an action at common law, arising from the marital relation, no longer exists, and it is not necessary to resort to equity, the action may be maintained at common law: *Blake v. Blake* (1874), 64 Me. 177; *Webster v. Webster* (1870,) 58 Id. 139.

[In Maryland (Pub. Gen. Laws, 1888, vol. 1, Art. 45, Sec. 4, p. 802.) "A married woman having no trustee, may, by her next friend, sue in a court of law or equity, in all cases for the recovery, or security, or protection of her property, as fully as if she were a *feme sole*.

[And (Id. 7,) "Any married woman, who by her skill, industry, or personal labor, shall earn any money, or other property, real, personal or mixed, shall hold the same, and the fruits, increase and profits thereof, to her sole and separate use, with power as a *feme sole*, to invest, re-invest, devise, bequeath, sell and dispose of the same; provided, that such money, or property, shall be liable for the payment of any claim, or debt, incurred by such married woman, in and about the business, occupation or enterprise in which said money or other property shall be earned or invested; and for any such debt, said married woman may be sued before any justice of the peace, or court of this State (whichever shall have jurisdiction, as determined by the amount of said debt) as if she were a *feme sole*; and any such property may be taken in execution to satisfy any judgment rendered on such cause of action; provided, that the husband of such married woman shall have the right to appear and defend any such suit in her name; and no judgment shall be entered in any such suit against such married woman without proof, unless by the joint consent, in writing, of herself and husband; provided further, that any married woman may sue in any court of law or equity in this State, upon any cause of action, in her own name, and without the necessity of a *prochein ami*, as if she were *feme sole*."

In *Edwards v. Stevens* (1862), 3 Allen (Mass.) 315, it was decided that a married woman could not bring an action against parties of whom her husband was one, to recover compensation for services under Gen. Stat., C. 108. The decision was on the ground that while the statute authorized her to "carry on any trade or business, and perform any labor or services on her sole and separate account, and sue and be sued in all matters having relation

to her separate property, business, trade, services, labor and earnings, in the same manner as if she were sole," yet in order to make a valid contract with her husband, he should also have the power to contract as if he were sole, which was nowhere given him. HOAR, J., called attention to *Lord v. Parker* (1861), at p. 127 in the same report, where it was settled "that a married woman cannot form a copartnership in business with her husband, for the reason, among others, that the true construction of the statutes [of 1855, C. 304, §§ 3 and 7 (of which § 3 became § 3 of C. 108 of Gen-Stat.) and of 1857, C. 249, § 2,] which authorize her to carry on business upon her sole and separate account, do not confer upon her the power to make a contract with her husband. That case is decisive of the present. These statutes are in derogation of the common law, and are not to be extended by implication": Id. p. 315. To the same effect: *Bowker v. Bradford* (1886), 140 Mass. 521.

[The Pub. Stat. (ed. 1882, ch. 147, p. 819,) afterwards specifically provided—"SEC. 2. A married woman may make contracts, oral and written, sealed and unsealed in the same manner as if she were sole, except that she shall not be authorized hereby to make contracts with her husband." And, by—"SEC. 7. A married woman may sue and be sued, in the same manner as if she were sole, but this section shall not be construed to authorize suits between husband and wife."

[And now it must be considered as established that a wife cannot enforce a note held by her, against her husband, even if originally made to a third person and endorsed to her. "As a promise to pay, the note is no longer valid:" C. ALLEN, J., *Wilson v. Bryant* (1883), 134 Mass. 291, 300. This, of course, is during coverture, as upon divorce, there

is no further disability: *Chapin v. Chapin* (1883), 135 Id. 393.

[Michigan (Howell's Ann. Stat., ed. 1883, p. 1638,) provides—"§ 6297. Actions may be brought by and against a married woman, in relation to her sole property, in the same manner as if she were unmarried, and in cases where the property of the husband cannot be sold, mortgaged or otherwise encumbered, without the consent of the wife, to be given in the manner prescribed by law, or when his property is exempted by law, from sale on execution, or other final process, issued from any court, against him, his wife may bring an action in her own name, with the like effect as in cases of actions in relation to her sole property, as aforesaid."

[And (p. 1635) by "§ 6295. That the real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her, in the same manner, and with like effect, as if she were unmarried." This section was originally enacted as Section one of the Statute of February 13, 1855, alluded to in the next case.

In *Jesse v. Marble* (1877), 37 Mich. 319, a man leased certain farms to his wife, and sold her certain animals. The lease contained clauses of eviction. The wife's contract to pay was executory, and she bound herself by her personal covenant. And CAMPBELL, J., ruled that such a contract could not be enforced by the husband's assignee, in an action at common law. "If we hold that the contract before us is valid, we

must do so on the ground that husbands and wives can contract with each other, just as freely as strangers can, and may sue each other just as freely, at law or in equity. No ground short of this can maintain this action. We think the statutes have not gone far enough to allow this, and that, so far as husbands and wives are concerned, they cannot contract with each other in any larger sense than they could formerly in equity, except that their contracts, when valid, may be enforced at law, where legal in form. Unless impliedly repealed, there can be no question as to the disability, under the whole code of statutes prior to the law of 1855, and the language of that statute is no broader than the equitable rule concerning separate property, laid down in the same words, in most of the old decisions:" *Id.* 325.

In *White v. White* (1885), 58 Mich. 546, it was decided that a wife might maintain an action of replevin against her husband, living apart from her, for her individual property, after making due demand therefor. And see *Carney v. Gleissner* (1885), 62 Wis. 493, in which such an action was sustained under § 2345 R. S. of Wisconsin.

In *Moore v. Foote* (1876), 34 Mich. 443, a wife held a lawful claim against a firm of which her husband was a member, and it was decided that she was not precluded from recovering upon it because of any incidental wrong that might result to one of the members of the firm.

[Hence, in *Benson v. Morgan* (1883), 50 Mich. 77, a married woman, in suing a firm of which her husband is a partner, must implead him as defendant, if the partners are not severally liable, in order to maintain her action. Here the wife was employed, with her husband's consent, by a firm in which he was interested, and which had full knowledge of her claims against them for her la-

bor; and she was not bound by any settlement therefor, made between her husband and the firm, without her authority.

[The competency of husband and wife as witnesses against each other, is now fixed by a statute, approved June 17, 1885 (Pub. Acts, p. 287), amending Howell's Ann. Stat. § 7546, by inserting the words in brackets,—“A husband shall not be examined as a witness, for or against his wife, without her consent; nor a wife, for or against her husband, without his consent, (except in cases where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the refusal or neglect to furnish the wife or children with suitable support, within the meaning of Act No. 336 of the session laws of 1883, and) except in cases where the husband or wife shall be a party to the record, in a suit, action, or proceeding where the title to the separate property of the husband or wife, so called or offered as a witness, or where the title to property derived from, through, or under the husband or wife, so called or offered as a witness, shall be the subject matter in controversy or litigation, in such suit, action, or proceeding, in opposition to the claim or interest of the other of said married persons, who is a party to the record in such suit, action, or proceeding; and in all such cases, such husband or wife who makes such claim of title, or under, or from whom such title is derived, shall be as competent to testify in relation to said separate property and the title thereto, without the consent of said husband or wife, who is a party to the record in such suit, action or proceeding, as though such marriage relation did not exist; nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other, during the marriage; but in

any action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife shall not be competent to testify."

[Minnesota. (Rev. Stat. 1878, ch. 66, p. 710.)—"§ 29. A married woman may sue or be sued as if unmarried, and without joining her husband, in all cases where the husband would not be a necessary party aside from the marriage relation." Of course, the wife appears alone in actions between her husband and herself: *FLANDRAU, J. Wolf v. Banning* (1859), 3 Minn. 202, 206.

[The Rev. Stat. also provide (Ch. 73, Tit. 1, p. 792, as amended by Ch. 72, Gen. L. 1889, p. 186, by adding the words in italics.)—"§ 10. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other. *Nor to proceedings supplementary to execution.*

[Mississippi, (Rev. Code, ed. 1880, p. 339,) enacts—"§ 1167. The Common Law, as to the disabilities of married women, and its effects on the rights of property of the wife, is totally abrogated, and marriage shall not be held to impose any disability or incapacity on a woman, as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts, and do all acts in reference to property, which she could lawfully do, if she was not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property, real

and personal, in possession or expectancy, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued, with all the rights and liabilities incident thereto, as if she was not married."

["§ 1168. Husband and wife may sue each other."

[As early as 1838, on an appeal from Chancery, the High Court of Errors and Appeals said: "The first objection to the proceedings below is, that the appellant, being a *feme covert*, exhibited her bill alone, against her husband. No doubt the wife was under a legal incapacity to bring a suit alone against her husband, and should have prosecuted her claim through the intervention of a *prochein ami*; yet when the incapacity appeared upon the face of the bill, as in the present case, the defendant must take advantage of it by demurrer: Coop. Eq. Plead. 163. [1 Dan. Chan. Pldg. *556.] The defendant having answered, the objection comes too late. It was urged by counsel, that the right of demurrer having been reserved in the answer, it was competent for them to make any defence that could have been made under a demurrer filed. We have found no authority to sustain this position; and we deem it a direct violation of the well-settled rule, which precludes a party from demurring and answering to the same part, or the whole of a bill:" PRAY, J., *Kenley v. Kenley* (1838), 2 How. (Miss.) 751, 753.

[By Miss. Rev. Code (ed. 1880, p. 447)—"§ 1601. Husband and wife may be introduced by each other, as witnesses in all cases, civil and criminal."

[In Missouri (Rev. Stat., ed. 1879, p. 592, chap. 59, Art. I.), by "§ 3468. When a married woman is a party, her husband must be joined with her in all actions, except those in which the husband is a sole plaintiff and the wife a sole defendant, or the wife a plaintiff and the husband a defendant, and in all

such actions, it shall be lawful for the wife to sue, or defend, by her agent or attorney, as she may think proper, and in all actions by husband and wife, or against husband and wife, they may prosecute the same by attorney; or they, or either, may defend by attorney; and it shall not be necessary for the wife, in any such case, to sue with her husband, by next friend, or to appear and defend by next friend."

[And the husband has, during the coverture, the right of possession of the wife's real estate, unless (by § 3292) he give cause for the proper Circuit Court to intervene, as shown in *Deguvie v. St. Jos. Lead Co.* (1889), U. S. Circ. Ct. E. Dist. Mo., 37 Fed. Repr. 663, and *Dyer v. Wittler* (1886), 89 Mo. 81, the wife's power to sue him would ordinarily relate to her personalty, in respect to which the Rev. Stat. (ed. 1879, p. 560, chap. 51,) provide—"§ 3296. Any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest, or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or have grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under her separate control, and shall not be liable to be taken by any process of law, for the debts of her husband. This section shall not affect the title of any husband to any personal property reduced to his possession with the express consent of his wife: provided, that said personal property shall not be deemed to have been reduced to possession, by the husband, by his use, occupancy, care or protection thereof; but the same shall remain her separate property, unless by the terms of said assent, in writing, full authority shall have been given by the wife to the hus-

band, to sell, incumber, or otherwise dispose of the same, for his own use and benefit; but such property shall be subject to execution for the payments of the debts of the wife, contracted before marriage, and for any debt, or liability, of her husband, created for necessities for the wife or family: and [added by amendatory Act of March 16, 1883, Laws, p. 113,] any such married woman may, in her own name, and without joining her husband as a party plaintiff, institute and maintain any action, in any of the courts of this State, having jurisdiction, for the recovery of any such personal property, including rights of action, as aforesaid, with the same force and effect as if such married woman was a *feme sole*; provided, any judgment for costs, in any such proceedings, rendered against any such married woman, may be satisfied out of any separate property of such married woman, subject to execution."

[Montana provides (by § 7 of Act of March 3, 1887; Comp. Stat. 1888, p. 61)—"SEC. 7. A married woman may sue and be sued, in the same manner as if she were *sole*."

[And (by § 1 of Act of March 3, 1887; Comp. Stat. 1888, p. 1045)—"SEC. 1439. That, from and after the passage of this Act, woman shall retain the same legal existence and legal personality after marriage, as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law, or equity, for redress and protection, that her husband has to appeal in his own name alone: *Provided*, This Act shall not confer upon the wife a right to vote, or hold office, except as is otherwise provided by law."

[Nebraska (Act of June 1, 1871; Laws 1875, p. 88; Comp. Stat. ed. 1885, p. 423, ch. 53) provides—"SEC. 3. A woman may, while married, sue and be sued, in the same manner as if she were unmarried." In *May v. May* (1879), 9 Neb. 16, an action by a wife against her husband, on two promissory notes, was sustained. One note had been made to a third person and assigned to the wife; and both had been made during coverture. "This capacity to sue is not limited, and no person, or class of persons, is excepted from its effect. If she were unmarried, there could be no doubt that she could sue this same man. This statute (as I understand it) plainly provides that she can do the same thing, though married to him:" *CONN, J.*, p. 25.

[This statute "has wholly removed the common law disability of a married woman:" *GANTT, J.*, *Pope v. Hooper* (1877), 6 Neb. 178, 187.

[Nevada (Act of March 10, 1873, p. 193, § 25; Gen. Stat. 1885, p. 147) permits—"Sec. 523. When the wife is living separate and apart from her husband, she may sue, and be sued, alone."

And (by § 7 of Act of March 8, 1869, p. 196; Gen. Stat. 1885, p. 756)—"SEC. 3029. When a married woman is a party, her husband shall be joined with her, except that: First. When the action concerns her separate property, she may sue alone. Second. When the action is between herself and her husband, she may sue, or be sued, alone."

[By the Code of Civil Procedure, as amended by Statute of 1881 (Gen. Stat. 1885, p. 833)—"SEC. 3403. A husband cannot be examined as a witness for, or against, his wife, without her consent, nor a wife, for, or against, her husband, without his consent; nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage. But

this exception shall not apply to an action, or proceeding, by one against the other."

[And by Act of November 21, 1861 (Gen. Stat. 1885, p. 878)—"SEC. 3642. If a person entitled to commence any action for the recovery of real property, or to make an entry, or defense, founded on the title to real property, or to rents, or services, out of the same, be, at the time such title shall first descend, or accrue, either: first, within the age of twenty-one years; or, second, insane; or, third, imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or, fourth, a married woman: SEC. 3643. The time during which such disability shall continue, shall not be deemed any portion of the time in this Act limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced, or entry or defense, made after that period."

[And by the same (p. 880)—"SEC. 3652. If a person entitled to bring an action other than for the recovery of real property, except for a penalty, or forfeiture, or against a sheriff, or other officer, for an escape, be, at the time the cause of action accrued, either: first, within the age of twenty-one years; or, second, insane; or, third, imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or, fourth, a married woman; the time of such disability shall not be a part of the time limited for the commencement of the action."

[New Hampshire (Gen. Laws 1878, p. 435, ch. 183) enacts that—"SECT. 12.

Every married woman shall have the same rights and remedies, and shall be subject to the same liabilities in relation to property held by her in her own right, as if she were unmarried, and may make contracts, and sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done before marriage, as if she were unmarried; *provided, however*, that the authority hereby given to make contracts, shall not affect the laws heretofore in force as to contracts between husband and wife; *and provided also*, that no contract, or conveyance, by a married woman, of property held by her, in her own right, as surety or guarantor for her husband, nor any undertaking by her for him, or in his behalf, shall be binding on her."

[And by the same chapter—"SECT. 13. Nothing in this chapter shall be construed to empower any husband to convey any of his property to his wife, in any other manner, or with any other effect, than if the same had not been passed."

["As was said, in effect, in *Houston v. Clark* (1871), 50 N. H. 482, the statute unquestionably removes all disabilities of the wife so far as regards her separate property, and gives her the same rights and remedies with respect thereto, as though she were *sole*. The logical result seems to be, that the status of marriage interposes no obstacle in the way of either party maintaining a suit at law against the other in respect to those contracts which the wife is empowered to make; for a contract, in form, is no contract, in any legal sense, unless the law, while recognizing it as valid, furnishes a remedy for its enforcement. Such right of action was, indeed, unequivocally recognized in *Clermont Bank v. Clark* (1865), 46 N. H. 134; for, if a judgment may be had against the wife as trustee of her husband, it must be for the reason that she has in

her hands, money, etc., of her husband, for which he himself would have been entitled to judgment, had he, instead of his creditors, brought the suit; and the decision is clearly put upon that ground. If then, the defendant owed a debt to his wife, which he was legally bound to pay, there was no reason why he might not use these notes [which were made by a third party to him, as payee, and by him indorsed to his wife in repayment of a loan,] for that purpose, as well as any other property, or money, which belonged to him, and the title thereto would pass to her, unless section 14 [Sect. 13, *supra*] is to have the construction claimed for it by the plaintiffs' counsel. * * * * But I think this was intended to guard against voluntary conveyances for the purpose of defrauding creditors, and that it cannot be held to prohibit the transfer of title in property or money, from husband to wife, for the purpose of paying an honest debt:" LADD, J., *Clough v. Russell* (1875), 55 N. H. 279, 281.

[The same judge made these remarks, which might well have been made, in the principal case: "The plaintiffs' counsel deprecate this wide departure from the doctrine and practice of the common law. Fortunately, the policy, or impolicy of the law, is not a matter we are to consider. We are to declare our judgment of its meaning and application, and if a mistake is made in ascertaining the legislative intent, the legislature is always at hand to correct it." Id. 281.

[And by Gen. Laws (ed. 1878, p. 531, ch. 228)—"SECT. 20. A husband and wife are competent witnesses for, or against, each other, whether joined as parties, or not, in all cases, both civil and criminal. SECT. 21. The preceding section shall not be so construed as to render competent the testimony of a husband, or wife, for, or against each other, as to any statement,

conversation, letter, or other communication made by either of them to the other, or to any other person; nor as to other matters, when it appears to the court that the examination of either, as a witness, in relation thereto, would lead to a violation of marital confidence."

[By the same (p. 510, ch. 221)—
"SECT. 2. If the person first entitled to bring such action [that is, for the recovery of real estate] is an infant, a married woman, or insane, at the time the right accrues, the action may be brought within five years after such disability is removed."

[And by the same (p. 571, ch. 221)—
"SECT. 7. Any infant, married woman, or insane person, may bring any personal actions within two years after such disability is removed.

[New Jersey provides (Revision of 1871, ed. 1877, p. 850)—"15. Every person of full age and sound memory may appear and prosecute, or defend, any action in any of the courts of this State, in person, or by his solicitor in chancery, or attorney-at-law."

[And (Id. 637)—"5. That any married woman shall, after the passing of this Act, have the right to bind herself by contract, in the same manner and to the same extent, as though she were unmarried, and which contracts shall be legal and obligatory, and may be enforced at law or in equity, by or against such married woman, in her own name, apart from her husband; *provided*, that nothing herein shall enable such married woman to become an accommodation endorser, guarantor, or surety, nor shall she be liable on any promise to pay the debt, or answer for the default, or liability, of any other person."

[And (Id. 638)—"11. That a married woman may maintain an action in her own name, and without joining her husband therein, for all breaches of contract, and for recovery of all debts, wages,

earnings, money and all property, both real and personal, which by this Act is declared to be her separate property, and for all damages done thereto, and she shall have, in her own name, the same remedies for the recovery and protection of such property as if she were an unmarried woman; and in any civil or criminal proceedings, it shall be sufficient to allege such property to be her property."

[And (Id. 598)—"24. Thirty years actual possession of any lands, tenements, or other real estate, uninterruptedly continued as aforesaid, wherever such possession commenced, or is founded upon a proprietary right duly laid thereon, and recorded in the surveyor general's office of the division in which such location was made, or in the secretary's office, agreeably to law, or wherever such possession was obtained by a fair *bona fide* purchase of such lands, tenements, or other real estate, of any person or persons whatever, in possession, and supposed to have a legal right and title thereto, or of the agent, or agents, of such person or persons, shall be a good and sufficient bar to all prior locations, rights, titles, conveyances, or claims whatever, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such lands, tenements, or other real estate; *provided always*, that if any person or persons having a right or title to lands, tenements, or other real estate, shall, at the time of said right or title first descended or accrued, be within the age of twenty-one years, *feme covert*, *non compos*, imprisoned, or without the United States of America, then such person or persons, and his and their heir and heirs, may, notwithstanding the aforesaid times are expired, be entitled to his or their action for the same, so as such person or persons, or his or their heirs, commence or sue forth his or their

action within five years after his or their full age, discoverture, coming of sound mind, enlargement out of prison, or coming within any of the United States, and at no time after; *and provided also*, that any citizen or citizens of this, or any other of the United States, and his or their heirs, having right or title to any lands, tenements, or other real estate within this State, may, notwithstanding the aforesaid times are expired, commence his or their action for such lands, tenements, or other real estate, at any time within five years next after the passing of this Act, and not afterwards."

[*Yeomans v. Petty, Adm'r, etc.*, decided in the Court of Chancery of New Jersey, October term, 1885, was a case where the wife brought suit against her husband's administrator to recover monies received by the husband as an advancement for the wife and as part of her separate estate, used and applied by the husband in improving his own farm, and also for money loaned by the wife to the husband, the defence being the Statute of Limitations. BIRD, V. C., said: "Until the Statute of Limitations is expressly extended to such cases, I cannot think it wise for the Court to hold that, because the husband or wife, who has a claim against the other, does not bring suit therefor, or within the statutory period, it shall be barred. The policy of the law is to prevent litigation between husband and wife."

[In *Chaves v. McKnight* (1857), 1 N. Mex. 150, the right of the wife to sue her husband was sustained under the civil law, BROCCUS, J., saying: "According to the civil law, a woman, on marrying, parts with many of her civil rights, and amongst the rights alienated by the conjugal association, is that of appearing generally in court, as plaintiff, or defendant, alone, or without the consent of her husband. But she does not part with the right of prosecuting suits against her husband when

causes of action against him arise," citing *Eseriche Mujer Casada*, 451. * * * "Such are the well-established principles of the civil law. Although a wife is thereby prohibited from entering alone, into litigation with other persons, without the consent of her husband, she is not prohibited from instituting and maintaining suits against him whenever she may have a legal or equitable cause of action."

[Subsequently an Act was passed (April 2, 1884, chap. 14; Comp. Laws 1884, p. 540), which provides—"§ 1087. All property, real, personal, and mixed, and choses in action, owned by any married woman, or owned or held by any woman at the time of her marriage, shall continue to be her separate property, notwithstanding such marriage; and any married woman may, during coverture, receive, take, hold, use, and enjoy property of any and every description, and all avails of her industry, free from any liability of her husband, on account of his debts, as fully as if she were unmarried." And by §§ 1880 and 1881 (p. 910), a wife has three years after discoverture, to bring actions at law or in equity, for any lands; and by § 1869 (p. 906), one year, in other cases.

In *Freethy v. Freethy* (1865), 42 Barb. (N. Y.) 641, an action was brought by the plaintiff, against her husband, to recover damages for slander. The words charged were clearly actionable, and the only question was the right of the wife to sue her husband under the Statute of 1862, § 3, which provided that "any married woman might bring and maintain an action, in her own name, for damages, against any person, or body corporate, for any injury to her person, or character, the same as if she were sole." The plaintiff was nonsuited. FOSTER, J.: "if the Legislature had intended to include such suits, it would have used language clearly denoting

such intention. * * * When the Legislature intends to make such a striking innovation of the rules of common law, and so much opposed to public policy, and the peace and happiness of the conjugal relation, as would be the case if husband and wife were permitted to sue each other, it should use such language as will make it clearly manifest."

[By the New York Code of Civil Procedure—"§ 450. In an action, or special proceeding, a married woman appears, prosecutes, or defends, alone, or joined with other parties, as if she was single. It is not necessary, or proper, to join her husband with her, as a party, in any action, or special proceeding, affecting her separate property." (The last sentence was added in 1879.) This section is substantially the same as § 7, chap. 90, Laws of 1860, as amended by § 3, chap. 172, Laws of 1862, which were both repealed by § 1, chap. 245, Laws of 1880, leaving the Code of Civil Procedure in force.

[In *Whitney v. Whitney* (1867), 49 Barb. (N. Y.) 319, a wife sued her husband to recover a sum of money which he took from under her pillow, while she was asleep. The Court ruled that a common law action would lie.

[The power of a wife to sue her husband was discussed by ADAMS, J. (*Alward v. Alward*, Supreme Ct. N. Y., Special Term, Cayuga County, June, 1888), and a "legal" action, with trial by jury, denied. The case was then proceeded in as a suit in equity, and a decree made in favor of the husband for money expended, at the request of the wife, in the management of her separate estate.

[The learned judge pointed out the conflict of decisions in New York State, in the absence of a decision of the Court of Appeals, fairly made, upon the precise question, and unhampered by other complications. "In the case of *Wright v. Wright* (1873), 54 N. Y. 437, the

commission of appeals held that a wife might maintain an action against her husband, upon a promissory note, and that it mattered not in what form she brought her action. In *Wood v. Wood* (1881), 83 N. Y. 575, it was held that a wife might maintain ejectment against her husband." This case expressly followed *Wright v. Wright*: to the same effect, *Minier v. Minier* (1870), 4 Lans (N. Y.) 421, decided under § 3, chap. 172, Laws of 1862, amending § 7, chap. 90, Laws of 1860.

["In *Howland v. Howland* (1880), 20 Hun (N. Y.) 472, it was held that she might likewise maintain replevin; in *Berdell v. Parkhurst* (1879), 19 Id. 350; s. c. 58 How. (N. Y.) 102, that the husband might sue his wife for conversion." In the former of these two cases BOARDMAN, J., said that "the weight of authority, and the reason of the married woman's law, sustain her right," citing *Wright v. Wright*, *supra*; *Perkins v. Perkins* (1872), 62 Barb. (N. Y.) 531; *Whitney v. Whitney*, *supra*; *Adams v. Curtis* (1870), 4 Lans. (N. Y.) 164. But *Perkins v. Perkins* denied that a husband could maintain an action at law, against his wife, to recover for services rendered, POTTER, J., explaining that "Interpreting these statutes (including that of 1862), to be *in pari materia*, as if all were contained in one Act, beginning with those of 1848 and 1849, entitled 'for the more effectual protection of the property of married women;' taking the common law as it has ever been declared; abrogating none of the common law, by forced construction, not expressed by a statute; and giving due force to the maxim, *expressio unius est exclusio alterius*, husbands are excluded from their provisions:" Id. 542.

[*Granger v. Granger* (1886), 2 N. Y. St. Rep. 211, was action by a husband against his wife, upon a promissory note given by her to her husband, for

the benefit of her separate estate: the action was held to be maintainable as the parties might contract with each other.

[ADAMS, J., *Alward v. Alward*, *supra*, "At first blush, these citations would seem to be conclusive upon the question under consideration. A careful examination convinces me, however, that so far as it relates to this precise question, what is said in the first two cases, [*Wright v. Wright* and *Wood v. Wood*,] is *obiter*; while the remainder are overruled, in principle at least, by some more recent decisions of the Court of Appeals. The general term in the first department, in the case of *Schultz v. Schultz* (1882), 27 Hun (N.Y.) 26, held that a married woman might sue her husband, in a civil action, for assault and battery. This decision, which is in direct conflict with those of *Freethy v. Freethy* (1865), 42 Barb. (N. Y.) 641, and *Longendike v. Longendike* (1863), 44 Id. 366, was placed upon the ground that the Acts of 1848, 1849, 1860 and 1862 had not only destroyed the unity of husband and wife, but had expressly conferred upon them, the right to sue each other in any form of action. On appeal to the Court of Appeals, the case was reversed (89 N. Y. 644); and although no opinion was written, the ground upon which the reversal was granted, is made quite obvious by the reference thereto which appears in the celebrated case of *Bertles v. Nunan* (1883), 92 N. Y. 160," where husband and wife were held to take by entireties, on a conveyance of land to them, notwithstanding this legislation. In this case, EARL, J., reviewed this legislation, and concluded that the common law incidents of marriage were swept away only by express enactments. "The ability of the wife to make contracts, is limited. Her general engagements are absolutely void, and she can bind herself by contract, only as she is expressly

authorized to do so by statute. A husband still has his common law right of tenancy by the curtesy. Although section seven of the Act of 1860, authorizes a married woman to maintain an action against any person, for an injury to her person or character, yet we have held that she cannot maintain an action against her husband for such an injury; and so it was held, notwithstanding the Acts of 1848, 1849 and 1860, that the common law disability of husband and wife, growing out of their unity of person, to convey to each other still existed:" 92 N. Y. 160. And *Bertles v. Nunan*, was affirmed in *Zornitlein v. Bram* (1885), 100 N. Y. 13.

["Neither the Act of 1848, nor that of 1849, contains any provision relating to the bringing of suit by married women. Obviously, the extent to which the Legislature designed to invade the common law rule by these Acts, was simply to confer upon married women the right to take, hold and convey their separate estate, in the same manner as though unmarried. By the Act of 1860, as thereafter amended by section seven, chapter 172, Laws of 1862, the additional right and liability to 'sue and be sued, in all matters relating to her sole and separate property, * * * in the same manner as if she were sole,' was conferred upon her. It is noticeable that this language of this section is substantially the same as that of section three of the Act of 1849, which permits a married woman to bargain, sell, and convey her real estate in the same manner, and with like effect, as if she were unmarried; and yet the Court of Appeals held, in *White v. Wager* (1862), 25 N. Y. 328, that this language did not enable her to convey directly to her husband; and this decision has been acquiesced in, down to within a year past, when it was abrogated by express enactment: Laws 1887, c. 537. It would seem, therefore, that if it required

specific action on the part of the Legislature, to enable husband and wife to convey directly to each other, it would require similar action to authorize them to sue each other. Careful investigation, however, discloses no such intention on the part of the law-making power. * * * I am not unmindful of the contention frequently heard, that the innovations which our modern civilization has made upon the conservatism of remoter generations, respecting the marital relations, are so radical in their character as to render it improper, if not impossible, to stop short of complete revolution; and such does, indeed, appear to be the tendency of recent legislation. I think, however, that I can perceive, upon the part of the court of last resort, a disposition to throw the responsibility for the new order of things, solely upon the law-making power, and, at the same time, to place a check upon this tendency, by adopting and adhering to rigid rules of construction:" ADAMS, J., *Atward v. Atward*, *supra*.

[North Carolina Code of Civil Procedure (chap. 10, Code of 1883, p. 67), provides—"SEC. 178. When a married woman is a party, her husband must be joined with her, except that (1), when the action concerns her separate property, she may sue alone; (2) when the action is between herself and her husband, she may sue, or be sued alone; and in no case need she prosecute, or defend, by a guardian, or next friend."

[And (p. 55) by—"SEC. 148. If a person entitled to commence any action for the recovery of real property, or to make an entry or defence, founded on the title to real property, or to rents and services out of the same, be, at the time such title shall descend or accrue, either (1), within the age of twenty-one years, or (2) insane, or (3) imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, or (4) a married woman; then such person

may, notwithstanding the time of limitation prescribed in this title be expired, commence his action, or make his entry, within three years next after full age, coming of sound mind, enlargement out of prison or discovery; and at no time thereafter."

[And (Id.) by—"SEC. 149. When two or more disabilities shall co-exist, or when one disability shall supervene an existing one, the period prescribed, within which an action may be brought, shall not begin to run until the termination of the latest disability."

[And (p. 62) by—"SEC. 163. If a person entitled to bring an action mentioned in the last chapter [*i.e.*, personal action], except for a penalty, or forfeiture, or against a sheriff, or other officer, for an escape, be, at the time the cause of action accrued, either (1), within the age of twenty-one years; or (2) insane; or (3) imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or (4) a married woman; then such person may bring his action within the times before limited, after the disability shall be removed."

[In *Lippard v. Troutman* (1875), 72 N. C. 551, and *Briggs v. Smith* (1880), 83 Id. 306, coverture was recognized as still affording protection, and the power of suing as a privilege, of which a failure to exercise was not to operate to the prejudice of the married woman. Her rights would be saved by the sections cited above.

[Upon the right of the wife to sue her husband, the case of *Manning v. Manning* (1878), 79 N. C. 293, is interesting. It was a demurrer to an ejectment by the wife, brought for the recovery from her husband, of real estate which she had been seized of in fee at the time of her marriage in 1873. The Constitution of the State, adopted in 1868, declares—Art. 10. "SEC. 6. The real and personal prop-

erty of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." The action was sustained because the wife was entitled "to be let into the possession, and to damages against her husband for appropriating to his own use, against her consent, the rents and profits." BYNUM, J., *Id.* 298. But the husband's right of ingress and regress into her dwelling upon the land, and to live there with her, was also recognized, as the law was not designed to indirectly create a legal separation, and "the possession of the husband is not like that of a stranger, adverse to the wife, but in law consists with it:" *Id.* 299.

[Ohio Revised Statutes (ed. 1889, vol. 1, p. 1257, as amended by Act of March 20, 1884), provide that—"SEC. 4996. A married woman shall sue, and be sued, as if she were unmarried, and her husband shall be joined with her only when the cause of action is in favor of, or against, both her and her husband." And (*Id.* 1341, *Id.*)—"SEC. 5319. When a married woman sues, or is sued, like proceedings shall be had and judgment rendered and enforced as if she were unmarried, and her property and estate shall be liable for the judgment against her, but she shall be entitled to the benefits of all exemptions to heads of families."

[There was no necessity of a suit imposed upon the wife, until the Amending Act of April 14, 1886 (Laws, p. 74), struck out the words "a married woman," from §§ 4978 and 4986 (which were the saving clauses of the

Statute of Limitations); perhaps, her husband might command her not to sue: "She ought to have the right to sue after his influence, power, and command are no longer felt:" ATHERTON, J. *Ashley v. Rockwell* (1885), 43 Ohio State 386, 388. Hence, the Court sustained an action for slander, though the period of limitation had expired. The wife was still *covert*.

[Oregon Code of Civil Procedure (as amended by Act of October 21, 1876, Laws, p. 73), provides—"SECT. 30. When a married woman is a party, her husband shall be joined with her, except that,—1. When the action affects her separate property, or when the cause of action is for a wrong committed against her person or character, or is for wages due for her personal services, she may sue, or be sued, alone. 2. When the action is between herself and her husband, she may sue, or be sued, alone, and, in no case, need she prosecute or defend by a guardian or next friend."

[By an Act of October 21, 1880 (Laws, p. 7), "to establish and protect the rights of married women. SECT. 1. All laws, which impose, or recognize, civil disabilities upon a wife, which are not imposed, or recognized as existing as to the husband, are hereby repealed: *Provided*, that this Act shall not confer the right to vote, or hold office, upon the wife, except as is otherwise provided by law; and for any unjust usurpation of her property, or natural rights, she shall have the same right to appeal, in her own name alone, to the courts of law or equity, for redress that her husband has." This statute received a literal interpretation in *Barrell v. Tilton* (1886), 119 U. S. 637, where a joint action against husband and wife, in joint possession of land, was sustained.

[The present Statute of Pennsylvania has already been quoted on page 748, *supra*.

[In *Reilley v. Reilley* (1872), 4 Brews. (Pa.) 169, and *Rohrman v. Rohrman* (1878), 12 Phila. 390 an attachment was sustained on the part of the wife against the husband's property, when deserted by him, although he was not a seafaring man and she had not been declared a *feme sole* trader. The attachment was issued in the name of the wife, under the second section of the Act of May 4, 1855 (P. L. 430)—“That whenever any husband, from drunkenness, profligacy, or other cause, shall neglect, or refuse, to provide for his wife, or shall desert her, she shall have all the rights and privileges secured to a *feme sole* trader, under the Act of February 22, 1718 * * * .” The Act of 1718 (1 Sm. L. 99) provided “That where any mariners, or others, are gone, or hereafter shall go, to sea, leaving their wives at shop-keeping, or to work for their livelihood at any other trade in this province, all such wives shall be deemed, adjudged and taken, and are hereby declared to be *feme sole* traders, and shall have ability, and are by this Act enabled, to sue and be sued, plead and be impleaded at law, in any court or courts of this province, during their husbands' natural lives, without naming their husbands in such suits, pleas or actions; * * * .”]

[This is true in many States, but is not developed in this annotation, as it lies outside of the special point treated.]

[In *Williams's Appeal* (1864), 47 Pa. 307, AGNEW, J., said: “Here is a judgment, admitted to be unobjectionable in point of honesty, given by a husband to secure his wife's separate estate. We are asked, in a question of mere distribution [of the proceeds of a sheriff's sale of the husband's property], to pronounce it void, upon the legal fiction that they are one in law. The proposition is shocking to any but the mind of a black-letter lawyer, and is to be denied, if it can be resisted upon any proper

legal principle. Unless we must, why should we go back to a period when legal logic, like that of the schools, was so metaphysical that rights were subservient to technicality, and substance to form? We should rather keep pace, if we can, with the progress of custom and legislation. Centuries were consumed in the slow process of parturition, giving birth to the benign features of the Act of 1848, securing the separate estate of married women.” The judgment was held to be valid.]

In *re Marvin* (1872), 10 Phila. 524, it was ruled that an execution issued by a wife on a judgment confessed by her husband directly to her, without the intervention of a trustee, will be set aside at the instance of another execution creditor. This was in the Common Pleas of Philadelphia county. The Supreme Court, however, sustained such an execution in *Ross et ux. v. Latschew* (1879), 90 Pa. 238, the principles of which decision also ruled *Lahr's Appeal* (1879), Id. 507. TRUNKY, J., said, in deciding the former case—

[“We have taken no account of the forboded ills to follow a decision that a wife's execution on a judgment against her husband, is not a nullity. The Commonwealth is none the worse for the advanced legislation for security of married women, in the ownership and enjoyment of their property, and will not be hurt if they are allowed process for collecting money honestly their due. An insolvent debtor may exhaust his means, in payment of a favored creditor, or he may confess judgment to that creditor, and all his property be seized in satisfaction thereof. This has long been the law, and now that the statute secures the wife her separate estate, when the husband owes her, he may rightly give her the preference. If fraud be alleged, the requisite proof to establish it, is no stronger, when the preference is given to a wife, than if to

a stranger and far greater strictness in proof is imposed in a wife, to make out her claim, than upon others": Id. 240.

[In *Kincade v. Cunningham* (1888), 118 Pa. 501, judgment was confessed by a man to a woman, on a bond, given in consideration of a contract to marry. They afterwards married, and a *sci. fa.* to revive the judgment was subsequently issued. Coverture and the want of a trustee for the plaintiff were not allowed to be set up as a defense to the judgment on the *scire facias*. "The question is not now one of the right of the wife to collect the judgment by execution against her husband's consent, but of her right to preserve her security": WILLIAMS, J., Id. 507. This case came before the Court a second time upon the question of the wife's right to issue execution on the judgment and levy on her husband's property, against his protest, and it was held that she had such right: *Kincade v. Cunningham* (1888), 1 Mona. (Pa.) 11.

[These cases are cited merely upon the right of the wife to sustain legal proceedings directly against her husband, at law and without the intervention of a trustee or next friend.

[By Act of March 27, 1713 (1 Smith's Laws, 76), as amended by § 27 of Act of July 30, 1842 (P. L. 456)—"§ 3. That if any person, or persons, who is, or shall be, entitled to any such action of trespass, detinue, trover, replevin, actions of account, debt, actions for trespass, for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be, or at the time of any cause of such action given or accrued, fallen, or come, shall be within the age of twenty-one years, *feme covert*, *non compos mentis* [or] imprisoned, that then such person, or persons, shall be at liberty to bring the same actions, so as they take the same within such times as are hereby before limited, after their coming to, or being of, full age,

discoverture, of sound memory [or] at large as other persons."

[By Act of March 26, 1785 (2 Smith's Laws, 300), as amended by § 1 of Act of March 11, 1815 (6 Smith's Laws, 277)—"SEC. 4. That if any person, or persons, having such right or title, be or shall be, at the time such right or title first descended or accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, [or] imprisoned, then such person or persons, and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, as he, she, or they, might have done before the passing of this Act, so as such person or persons, or the heir or heirs of such person or persons, shall, within ten years next after attaining full age, discoverture, soundness of mind, or enlargement out of prison, take benefit of or sue for the same, and no time after the said ten years. And in case such person or persons shall die within the said term of ten years, under any of the disabilities aforesaid, the heir or heirs of such person or persons, shall have the same benefit that such person or persons could or might have had by living until the disabilities should have ceased, or been removed. And if any abatement happen in any proceeding or proceedings upon such right or title, such proceeding or proceedings may be renewed and continued, within three years from the time of such abatement, but not afterwards."

[By Act of April 22, 1856 (P. L. 532)—"SEC. 1. No exception in any Act of Assembly respecting the limitation of actions in favor of persons *non compos mentis*, imprisoned, *femes covert*, or minors, shall extend so as to permit any person to maintain any action for the recovery of any lands or tenements, after thirty years shall have elapsed since the right of entry thereto accrued, to any

person within the exceptions aforesaid: *Provided*, That all persons who now have rights unbarred, and who would be sooner barred by this section, shall not be thereby barred for five years from the date hereof."

In *Kutz's Appeal* (1861), 40 Pa. 90, a married woman, in 1845, lent to a partnership, of which her husband was a member, money from her separate estate, for which she received a note payable in one year with interest. In 1857, the firm made an assignment. Before the auditor, the claim was presented but the creditors objected, alleging that it was barred by the Statute of Limitations. The claim was allowed, but the exceptions filed were sustained and the case was taken to the Supreme Court, which reversed the decree of the lower court. STRONG, J.: "In *Towers v. Hagner* (1837), 3 Whart. Pa. 48, it was ruled that when a wife lends the income of her separate estate to her husband, the Statute of Limitations does not begin to run against her claim until the death of her husband. The reason given was, that until then she cannot sue. The debt exists, but the remedy is suspended. * * * The wife was permitted to receive her property and to lend it, the husband himself becoming the borrower. It is not for him, therefore to object that the money was not hers, nor for the creditors claiming through him." A similar ruling was in *Marsteller v. Marsteller* (1880), 93 Pa. 350, where suit was brought by the administrators of a married woman against her husband for money loaned.

The Act of April 11, 1856 (P. L. 315), provides—"§ 3. Whensoever any husband shall have deserted or separated himself from his wife, or neglected or refused to support her, or she shall have been divorced from his bed and board, it shall be lawful for her to protect her reputation, by an action for slander or libel; and she shall also have the right,

by action, to recover her separate earnings or property: *Provided*, That if her husband be the defendant, the action shall be in the name of a next friend."

In *Miller v. Miller* (1863), 14 Pa. 170, an action of covenant was brought by a married woman, by her next friend, against her husband, for permitting waste on property conveyed to him for life by an ante-nuptial contract. The question arose as to the power of the court to sustain the suit. The lower court, in a learned opinion which was affirmed by the Supreme Court, said:—"It is a well settled principle of the common law that no suit will lie between husband and wife. To every action there must be parties and they are both treated as one, a man might as well be permitted to sue himself. It is otherwise in equity. A husband may sustain a bill against his wife in a Court of Chancery, or a wife against her husband. This difference in the power of the courts to sustain such proceedings, arises from two causes. The Courts of Chancery adopted the principles of the civil law for their guidance, in their early organization, and under that law, husband and wife could contract with each other as if *sole*, could sue each other to obtain their rights or enforce their contracts, and hold their property in severalty for every purpose. And the practice in equity has always been to look to the substance of the right, and bring in all parties, without regard to form. In Pennsylvania, our courts have adopted the common law forms of action, although affecting to give relief on equitable principles. It has never been pretended that a husband could sue his wife, or a wife her husband in this State, unless authority to do so by an Act of Assembly. The only question is, can they sue each other by virtue of any statute? Can the suit be sustained under the third section of the Act of April 11, 1856? * * * Three cases are provided

for—she may sue to protect her reputation, and to recover her separate earnings or property. * * * As we conceive, the statute was intended to enable her to sue for the recovery of her earnings, and also for her effects, if carried off, either by her husband or others. She might have such a property in a bond or promissory note as would enable her to maintain an action, but unliquidated damages are not property, either in common parlance or technical language. If the act had intended to give the wife a general power to sue, as a *feme sole*, it would have said so. * * * *Expressio unius exclusio est alterius*, is a sound legal maxim. This may, to a certain extent, be treated as a remedial statute, and therefore entitled to a liberal construction, but as it countervails a great common law principle, which makes the husband and wife one, and overturns a salutary rule of public policy, which prohibits and discourages all litigation between husband and wife, it should be strictly construed, and not extended beyond the letter. * * * I am therefore of the opinion that this suit for the recovery of damages on account of a covenant broken, is not authorized by the Act of Assembly."

[The Public Statutes of Rhode Island, (chap. 166, ed. 1882, pp. 424, 423), provide—"SECT. 16. In all actions relating to the property of any married woman, secured to her by this chapter, the husband and wife shall jointly sue and be sued, except in case a trustee of the same be appointed as hereinafter provided, and except in actions upon such contracts as she is authorized to make by section six of this chapter, in which last case the wife may sue and be sued alone." Section 6 is as follows: "Any married woman may sell and convey any of her personal estate other than that described in the preceding section, in the same manner as if she were single and unmarried, and may

make contracts respecting the sale and conveyance thereof, with the same effect and with the same rights, remedies and liabilities, as if such contracts had been made before marriage, but nothing in this section shall be so construed as to authorize any married woman to transact business as a trader."

[The Code of Civil Procedure of South Carolina (ed. 1888, p. 93), requires—"SECT. 135. When a married woman is a party, her husband must be joined with her, except that—1. When the action concerns her separate property, she may sue, or be sued, alone; *Provided*, That neither her husband, nor his property, shall be liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate, in the same manner as if she were *sole*. 2. When the action is between herself and her husband, she may sue, or be sued, alone; and in no case need she prosecute, or defend, by a guardian or next friend."

[Under this provision, a wife may file a complaint against her husband for support and maintenance, as a distinct cause of relief: *Christopher v. Christopher* (1882), 18 S. C. 600.

[A married woman is not included amongst those under disabilities, who are excepted out of the periods of limitation: Code of Civil Procedure (ed. 1888, pp. 81, 87), §§ 108, 122.

[In Texas, "under our system of marital law, as regulated by the constitution and statutes, and as expounded from time to time by this Court, the wife can, in a proper case, for the protection of her separate rights, maintain a suit in her own name, against her husband. * * * We also believe that she would be entitled, in a proper case, to the benefit of writs of attachment, sequestration, injunction, or any like writ, to which any other creditor would be entitled, in order to protect and preserve

his rights. Of course, writs of this character, between husband and wife, ought not to be encouraged, and ought, in every instance, to be scrutinized very closely indeed, by the courts, and every effort made to prevent fraud and collusion between them, to the prejudice of the rights of creditors, or third parties:" WEST, A. J., *Ryan v. Ryan* (1884), 61 Texas, 474. This was an action of debt by the wife against her husband, into which certain creditors of the husband intervened. The court below erred in giving a binding instruction that the wife could not acquire rights paramount to the creditors of the husband, by issuing an attachment in her suit, against the community property.

[By the Revised Civil Statutes of Texas (ed. 1888, Vol. I, p. 412)—"ART. 1204. The husband may sue, either alone, or jointly with his wife, for the recovery of any separate property of the wife, and in case he fail or neglect so to do, she may, by the authority of the court, sue for such property in her own name."

In *Nickerson v. Matson* (1886), 65 Tex. 281, it was decided that where a suit was brought by a married woman against her husband and another, for false imprisonment, it could not be sustained as to the husband. The Court, in a lengthy opinion, maintained and approved the doctrine in *Longendyke v. Longendyke* (1863), 44 Barb. (N.Y.) 366.

[By Revised Civil Stat. (ed. 1888, pp. 114, 120)—"ART. 3201. If a person entitled to commence suit for the recovery of real property, or to make any defense founded on the title thereto, be, at the time such title shall first descend, or the adverse possession commence—1. Under the age of twenty-one years; or, 2. A married woman; or, 3. Of unsound mind; or, 4. A person imprisoned; the time during which such disability shall continue shall not be deemed any portion of the time limited for the com-

mencement of such suit, or the making of such defense; and such person shall have the same time, after the removal of his disability, that is allowed to others by the provisions of this chapter." And "ART. 3222. If a person entitled to bring any action other than those mentioned in chapter one of this title [*i.e.*, actions for land], be, at the time the cause of action accrues, either—1. Under the age of twenty-one years; 2. A married woman; 3. Of unsound mind; 4. A person imprisoned; the time of such disability shall not be deemed a portion of the time limited for the commencement of the action, and such person shall have the same time, after the removal of his disability, that is allowed to others by the provisions of this title."

[The disability of a married woman, under this limitation law, is not such as to save a right of action involving the homestead, or community property; in such a case, she could maintain an action during coverture. "The Legislature might well have provided, that, when the husband attempts the alienation of the homestead, without the consent of the wife, the statute should not run against her as long as she lives. But, in our opinion, they have not done this:" GAINES, A. J., *Hussey v. Moser* (1888), 70 Texas 42, 46. However, the right of a wife to protect community property which is exempt from execution, is within the statute, and her disability will extend the time for commencing an action: *Alsup et al. v. Jordan* (1887), 69 Texas 300, 304.

[Utah (Compiled Laws, 1876, Tit. XVI., Ch. 1, p. 342) enacts that—"SEC. 2. Either spouse may sue or be sued, plead and be impleaded, or defend and be defended at law."

[And (under Tit. XI, Ch. 1, p. 506) —"SEC. 379. A husband shall not be a witness for, or against, his wife, nor a wife a witness for, or against, her husband; nor can either, during the mar-

riage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. But this exception shall not apply to an action or proceeding by one against the other."

[*Howe et al. v. Blandin et al.* (1849), 21 Vt. 315, decided that the proceedings to compel partition of real estate between tenants in common, under the statute of this State, was an adversary proceeding, and could only be sustained between those, who could be suitors, in respect to each other, in the common law courts. A husband and wife who were tenants in common of real estate, could not constitute adverse parties in such a proceeding; and if the county court sustained a petition where the only parties were husband and wife, and the object was to procure a division of land held by them in common, the judgment ordering the partition, must be treated as a nullity and the whole proceeding held *coram non judice*.

[The Revised Statutes of Vermont (ed. 1880, Tit. 16, chap. 122), as amended by Act of November 26, 1884 (Laws, p. 120), provide—"SEC. 2321. A married woman may make contracts with any person other than her husband, and bind herself and her separate property, in the same manner as if she were unmarried, and may sue and be sued as to all such contracts made by her, either before or during coverture, without her husband being joined in the action as plaintiff or defendant, and execution may issue against her, and be levied on her sole and separate goods, chattels, and estate. But this section shall be subject to the limitation, that nothing herein contained shall authorize a married woman to convey, or mortgage, her real estate, except by deed duly executed by her and her husband, as now provided by law; and to the further limitation that nothing herein contained shall authorize a married

woman to become surety for her husband's debts, except by way of mortgage duly executed, as now provided by law."

[*Ellsworth v. Hopkins*, decided by the Supreme Court of Vermont, August 11, 1886, was a case in which the Court ruled that a promissory note executed by a husband to his wife was void, and no action could be maintained thereon, not even by a third party, endorsee; POWERS, J., saying: "As between Hopkins and his wife, the note was null and void. They were, at law, incapable of contracting with each other, and contracts assumed to be made between them, were not merely voidable, but absolutely without obligation or force. * * * There is nothing to show that this note was the separate statutory or equitable estate of Mrs. Hopkins. Had such facts appeared, the note might have represented an enforceable equitable obligation which equity would protect." So, also, *Sweat v. Hall* (1836), 8 Vt. 187, to the same effect.

[Virginia, under Code of 1887 (Tit. 28, Ch. 103, p. 567), provides—"SEC. 2284. All real and personal estate, to which any woman hereafter marrying, is entitled at the time of her marriage, or which any married woman may hereafter acquire or become entitled to, during coverture, by gift, grant, purchase, descent, devise, bequest, or in any other manner whatever, and the rents, issues, income, profits, and all increase thereof, shall be and continue her separate estate. The separate estate shall include rights of action, damages for a wrong, and compensation for property taken for public use, to which a woman is entitled at her marriage, or to which she becomes entitled during coverture. Nothing however in this, or any other section of this chapter, shall be construed as giving to a married woman a right to damages, or a right of action therefor against her husband for any in-

jury to her person or reputation committed by him before their marriage or during the coverture."

[And (p. 698)—"SEC. 2917. If, at the time at which the right of any person to make entry on, or bring an action to recover any land, shall have first accrued, such person shall be an infant, married woman, or insane, then such person, or the person claiming through him, may, notwithstanding the said period mentioned in section twenty-nine hundred and fifteen shall have expired, make an entry on, or bring an action to recover such land, within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid, shall have ceased to be under such disability as existed when the same so accrued, or shall have died, whichever shall first have happened. This section shall not apply to a married woman having the right to make an entry on, or bring an action to recover land, which is her separate estate."

[And (p. 702)—"SEC. 2931. If any person, to whom the right accrues to bring any such personal action, or *scire facias*, or any such bill to repeal a grant, shall be, at the time the same accrues, an infant, married woman, or insane, the same may be brought within the like number of years after his becoming of full age, unmarried, or sane, that is allowed to a person having no such impediment to bring the same after the right accrues, or after such acknowledgement as aforesaid, except that it shall, in no case, be brought after twenty years from the time when the right accrued. This section shall not apply to a married woman to whom the right accrues to bring any such action, or *scire facias*, or such bill to repeal a grant, relating to or affecting her separate estate."

[Washington, (Code of 1881, Ch. 183, p. 413), provides—"SEC. 2396.

Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued, as if he or she were unmarried."

[And (p. 413)—"SEC. 2398. All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights, she shall have the same right to appeal, in her own name, to the courts of law or equity, for redress and protection, that the husband has: *Provided always*, that nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law."

[And (p. 414)—"SEC. 2401. Should either husband, or wife, obtain possession, or control, of property belonging to the other, either before, or after, marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner, and to the same extent, as if they were unmarried."

[By the same Code of Civil procedure (Code of 1881, Ch. 1, p. 35)—"SEC. 6. When a married woman is a party, her husband must be joined with her, except: 1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone. 2. When the action is between herself and her husband she may sue or be sued alone. 3. When she is living separate and apart from her husband, she may sue or be sued alone."

[West Virginia provides by Code of 1887 (Ch. 66, p. 606)—"12. A married woman may sue and be sued without joining her husband in the following cases: 1. Where the action concerns her separate property. 2. When the action is between herself and her hus-

band. 3. When she is living separate and apart from her husband. And in no case need she prosecute or defend by guardian or next friend."

[And, by (Ch. 104, p. 710)—"3. If, at the time at which the right of any person to make an entry on, or bring an action to recover, any land, shall have first accrued, such person was an infant, married woman, or insane, then such person, or the person claiming through him, may, notwithstanding the said period of ten years shall have expired (except in the case of a married woman, where such land is her sole and separate property), make an entry on, or bring an action to recover, such land, within five years next after the time at which the person to whom such right shall have first accrued as aforesaid, shall have ceased to be under such disability as existed when the same accrued, or shall have died, whichever shall first have happened.

(And, by (Chap. 104, p. 713)—"16. If any person, to whom the right accrues to bring any such personal action, suit, or *scire facias*, or any such bill to repeal a grant, shall be, at the time the same accrues, an infant, married woman, or insane, the same (except in the case of the married woman, as provided in section 3 [*supra*] of this chapter), may be brought within the like number of years after his becoming of full age, unmarried or sane, that is allowed to a person, having no such impediment to bring the same after the right accrues, or after such acknowledgment as aforesaid, except that it shall in no case be brought after twenty years from the time when the right accrued."

In *Roseberry v. Roseberry* (1886), 27 W. Va. 759, an action of debt was brought by a married woman against her husband, on notes executed by defendant in favor of plaintiff. The action was dismissed, since the common law is in full force and vigor in West Vir-

ginia, as to the power of a married woman to contract with her husband. And see *Crowther v. Crowther* (1868), 55 Me. 358; *Smith v. Gorman* (1856), 41 Id. 408; *Jackson v. Parks* (1852), 10 Cush. (Mass.) 550; *Ingham v. White* (1862), 4 Allen (Mass.) 412; *Carey & Co. v. Burruss & Pitzer* (1882), 20 W. Va. 571.

[Wisconsin (Annotated Stat. 1889, Ch. 108, p. 1358) enacts—"SEC. 2345. Every married woman may sue in her own name, and shall have all the remedies of an unmarried woman, in regard to her separate property or business, and to recover the earnings secured to her by the two next preceding sections, and shall be liable to be sued in respect to her separate property or business, and judgment may be rendered against her and be enforced against her and her separate property, in all respects as if she were unmarried. And any married woman may bring and maintain an action in her own name for any injury to her person or character, the same as if she were *sole*, and any judgment recovered in such action shall be the separate property and estate of such married woman, *provided* that nothing herein contained shall affect the right of the husband to maintain a separate action for any such injuries as now provided by law."

[By the same Stat. (Tit. 25, Ch. 118, p. 1486)—"Sec. 2608. When a married woman is a party, her husband must be joined with her, except that when the action concerns her separate property or business, or alleged antenuptial debts, or is between herself and her husband, she may sue and be sued alone."

[In *Beard v. Dedolph* (1871), 29 Wis. 140, DIXON, C. J., said: "With respect to her separate property, the statute has placed her upon the same footing as to all the world, her husband included, as if this were her condition—as if she were, in the words of the Act,

'a single female.' " In this case, the husband transferred to his wife, the note in suit, before maturity, and the case relates only to the validity of the transfer. But it was the foundation for the next cited case.

In *Carmy v. Gleissner, et al.* (1885), 62 Wis. 494, the question arose in an action of replevin, as to the right of a man to recover from his wife certain property held by her.

CASSIDAY, J.: "It is urged the wife should not be made a party defendant, because the husband cannot maintain an action against his wife. This certainly would be the law on the old theory of the marital relation. Whether it is now, must depend upon statute. It is the law that every married woman may sue in her own name, and has all the remedies of an unmarried woman, in regard to her separate property or business: R. S., § 2345. The statute entirely removes the disabilities of coverture. As to her separate property, or in contests over what she claims to be her separate property, there can be no doubt under this statute but what she can sue her husband at law or in equity;" citing *Moore v. Moore* (1872), 47 N. Y. 467; *Southwick v. Southwick* (1872), 49 Id. 510; *Wright v. Wright* (1873), 54 Id. 437; *Berdell v. Parkhurst* (1879), 19 Hun (N. Y.) 358; *Wood v. Wood* (1881), 83 N. Y. 575.

[Wyoming (Rev. Stat. 1887, Tit. 28, Ch. 2, p. 417) provides—"SEC. 1560. Any woman may, while married, sue and be sued in all matters having relation to her property, person, or reputation, in the same manner as if she were

sole." And under the Code of Civil Procedure (Id., Tit. 38, Ch. 3, p. 559) —"SEC. 2385. Hereafter, in any civil action, suit or proceeding, whenever any married woman is a party, it shall not be necessary to join her husband with her as a party, except in such cases where it would be necessary to join such husband without reference to the fact of his marriage to such woman."

There are reasons for construing statutes as against authorizing actions for tort between husband and wife, which do not exist in respect to actions relating to contracts. Before the statutes, the damages arising from injuries to the person or character of the wife, were to be sued for by the husband and wife, and when recovered, belonged to the husband, and these statutes were evidently intended to change the law only to allow the wife to sue for and recover for herself in all matters pertaining to her separate property. Were actions for tort to be sustained by the wife against her husband under statute law, there would be a lack of mutuality of remedy.

[Note should be made that this annotation relates solely to the power of a wife to sue her husband, alone and without any trustee or other third person, at law and not in equity, and under ordinary circumstances and not in cases of desertion or other special statutory power. The subject is so extensive and yet so important as to demand this minute treatment. The other causes of suit will be treated in the future.—ED.]

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ABSTRACTS OF RECENT DECISIONS.

ACCIDENT INSURANCE.

Shop-hand of railway company, who is killed, while on his way home from work, by being thrown from the platform of a car, where he was standing while the train was in motion, is not protected by a policy of accident insurance, which excepts from the risks covered injuries resulting from being upon the platforms of moving cars, this exception not being applicable, however, to the exposure of railway employes in the performance of their duty. *Hull v. Equitable Accident Asso.*, S. Ct. Minn., July 15, 1889.

Voluntary exposure to unnecessary danger is not chargeable to a passenger on a railway train, who goes upon the car platform, while the train is in motion, because he is overcome by the heat of the car and is suffering from nausea. *Marx v. Travelers' Ins. Co.*, U. S. C. Ct., D. Col., July 24, 1889.

ADMIRALTY.

Damages for death of one injured while engaged in loading a vessel, cannot be made the subject of a libel in admiralty, in the absence of any statute providing a maritime lien for such damages. *Welsh v. The North Carolina*, U. S. D. Ct., E. D. Pa., June 25, 1889.

Stipulation in charter-party that "all disputes * * * arising on this charter-party, or on bills of lading signed thereunder, shall be settled at port of discharge only," is contrary to public policy and void. *Prince Steam Shipping Co. v. Lehman*, U. S. D. Ct., S. D. N. Y., Sept. 4, 1889.

ALIENS.

Native of Hawaiian Islands, not being of the white or African races, cannot become a citizen of the United States under the naturalization laws. *In re Kanaka Man*, S. Ct. Utah, June 7, 1889.

BANKS AND BANKING.

Acceptance of check is constituted where the payee, before taking the check, telegraphed to the bank, asking if it would pay T.'s check for \$22,000, and the bank replied, also by telegraph: "T. is good. Send on your paper." *Garrettson v. North Atchison Bank*, U. S. C. Ct., W. D. Mo., June 17, 1889.

National bank cannot make, through the agency of another bank, a valid contract for the cashing of checks upon it at a different place from the location specified in its organization certificate. *Armstrong v. Second Nat. Bank of Springfield*, U. S. D. Ct., S. D. Ohio, May 20, 1889.

Proceeds of paper sent by one bank to another "for collection," the latter bank agreeing to collect and remit on specified dates, can be recovered after the failure of the collecting bank, from its receiver, on the ground of a trust, provided it is shown that such proceeds have passed into the receiver's hands, either in the original or some substituted form. *Commercial Nat. Bank v. Armstrong*, U. S. C. Ct., S. D. Ohio, Aug. 30, 1889.

Refusal to honor check, without legal cause, entitles the depositor to recover substantial damages against the bank. *Patterson v. Marine Nat. Bank*, S. Ct. Pa., Nov. 11, 1889.

Stockholder of national bank, who makes a *bona fide* sale of his stock and goes with the purchaser to the bank, indorses the certificate and delivers it to the cashier, with directions to make the transfer on the books, has done all that is incumbent upon him to discharge his liability, and he is not liable, upon the subsequent suspension of the bank, for an assessment on the stock, although the cashier failed to actually make the transfer. *Hayes v. Shoemaker*, U. S. C. Ct., N. D. N. Y., July 23, 1889.

BICYCLES.

Rider of a bicycle has equal rights upon the highway with a person in a carriage drawn by horses, and allegations that a defendant rode a bicycle in the center of the road, at the rate of fifteen miles an hour, up to within twenty-five feet of the faces of the plaintiff's horses, whereby they became frightened and ran away and injured the plaintiff, do not state a cause of action. *Holland v. Barch*, S. Ct. Ind., Sept. 18, 1889.

BILLS AND NOTES.

Accommodation indorser of a bill of exchange, who meets the debt when legally charged with its payment, becomes a holder for value and may recover from an accommodation acceptor of the bill the full amount paid by him, although he knew at the time of his indorsement that the acceptance was for accommodation. *Gillespie v. Campbell*, U. S. C. Ct., N. D. Ill., Sept. 9, 1889.

Delay of ten months after the indorsement of a note payable on demand, in presenting the same and giving notice of non-payment, is unreasonable and will discharge the indorser. *Turner v. Benjamin*, S. Ct. Wis., Sept. 24, 1889.

Draft on bank, payable on a day subsequent to its date, is not a check, but a bill of exchange, and is entitled to days of grace. *Harrison v. Nicollet Nat. Bank*, S. Ct. Minn., Oct. 18, 1889.

Indorsee of negotiable promissory note, where the indorsement was not made for value, nor in due course of trade, but for the purpose of collection merely, may maintain an action upon the note in his own name, but such action will be subject to any defence the maker may have against the prior indorser. *Roberts v. Snow*, S. Ct. Neb., Oct. 3, 1889.

Interest from maturity upon a promissory note, payable five years after date, was to be paid at the rate of twelve per cent. *per annum*, then the highest legal rate of interest allowed by the State law, but before the note matured the maximum rate was reduced to ten per cent.; only ten per cent. interest could be collected upon the note. *Richardson v. Campbell*, S. Ct. Neb., Oct. 16, 1889.

BILLS OF LADING.

Consignee, where the bill of lading stipulates that he must be ready to receive his cargo on the ship's readiness to discharge,

otherwise the master may land it upon the wharf, without notice to and at the consignee's risk, is bound to watch for the ship's arrival and be ready to receive the goods at the time and place of delivery, and, in default of such readiness, the ship may land its cargo without previous notice. *Rolfe v. The Boskenna Bay*, U. S. C. Ct., S. D. N. Y., Oct. 7, 1889.

Exemption of vessel owners, by the terms of a bill of lading, from liability for "damage done by vermin," does not exonerate them from responsibility for injuries by rats, resulting from their negligence in omitting to fumigate the ship before loading, and the burden is upon them to show that the injuries were not the result of such negligence. *Stevens v. Navigazione Generale Italiana*, U. S. D. Ct., S. D. N. Y., Aug. 10, 1889.

CHARITIES.

Bequest to "the trustees of the Physio-Medical College of Cincinnati, Ohio, to be used by the college for the promotion of the medical art, as favored and believed in by the testator, and in support of that institution," will not, on proof that no corporation of that name exists, be decreed to belong to the "Physio-Medical Institute," when it appears that the testator intended to give the bequest to an unincorporated medical school, which he supposed to be incorporated and which had ceased to exist. *Stratton v. Physio-Medical College*, S. Jud. Ct. Mass., June 20, 1889.

Bequest in remainder "to any responsible corporation in this city, existing at the time of the death" of the precedent legatee, "whose permanent fund is established by its charter for the purpose of ameliorating the condition of the Jews in Jerusalem, Palestine, * * * by promoting among them education, arts and sciences, and by learning them mechanical and agricultural vocations," does not pass to a corporation whose object, as shown by its charter, is to contribute "to the relief of the indigent Jews in Jerusalem, Palestine," of which testator, a lawyer, was an incorporator and president at the time of executing the will, and which the will does not mention, although there is no other corporation in existence at the time mentioned, which can take the legacy. *Riker v. Leo*, Ct. App. N. Y., June 4, 1889.

On dissolution of a eleemosynary corporation, having no debts and no stockholders, the title to its land reverts to the original owner. *Mott v. Danville Seminary*, S. Ct. Ill., June 15, 1889.

CHECKS.

Payment of debt by a check was not constituted, when the debtor sent the check to its creditor, who, the same day, forwarded it to its bank in New York for collection, and the New York bank, the day after its receipt, sent the check to the bank upon which it was drawn for collection and remittance, according to a common practice among banks, in which case the usual form of remittance is by draft; the latter bank sent a New York draft for the amount, but on the same day failed and made an assignment, and the draft, being presented without delay, payment was refused. *Thomas v. Westchester County*, Ct. App. N. Y., June 4, 1889.

COMMON CARRIERS.

Contract to carry freight at a special rate, less than the published schedule, will not be adjudged an "undue or unreasonable discrimination," in the absence of evidence that such special rate is an exclusive privilege. *Bayles v. Kansas Pac. Ry. Co.*, S. Ct. Colo., Sept. 13, 1889.

CONSTITUTIONAL LAW.

License tax on express companies, imposed by a State, is unconstitutional, as invading the exclusive power of Congress to regulate interstate commerce, so far as regards an express company engaged in interstate transportation. *U. S. Express Co. v. Allen*, U. S. C. Ct., E. D. Tenn., Sept. 21, 1889.

Registration law, providing that no person shall practice dentistry without having obtained a degree from some dental college, or a license from the State dental society, and imposing a certain fee, but exempting non-resident physicians when called into the State by professional duties, and persons who have resided and practiced the profession at their present places of residence for a specified time, is unconstitutional, as unduly discriminating between persons of the same class. *State v. Hinman*, S. Ct. N. H., July 26, 1889.

State statute prohibiting sale of dressed meat, unless the animal within twenty-four hours before slaughter was inspected by State officers and found healthy and suitable for food, thus having the effect of excluding dressed meat slaughtered outside the State, is unconstitutional, as usurping the power of Congress to regulate interstate commerce and abridging the privileges and immunities of citizens of other States. *Swift v. Sutfin*, U. S. C. Ct., N. D. Ill., Sept. 13, 1889. *In re Barber*, U. S. C. Ct., D. Minn., Sept. 23, 1889.

CONTEMPT OF COURT.

Attempt to bribe juror is a contempt of court and may be punished as such, although no prejudice to either party to the suit on trial has resulted from such attempt. *Langdon v. Judges of Wayne Circuit Court*, S. Ct. Mich., Oct. 11, 1889.

CORPORATIONS.

Directors of insolvent corporation are trustees for its creditors, and they cannot obtain priority over a creditor by taking mortgages to themselves to secure them for advances made to the corporation and their indorsement of its notes, after the creditor has brought suit, and when the corporation is insolvent. *Olney v. Conanticut Land Co.*, S. Ct. R. I., Aug. 10, 1889.

Subscriber to stock of a corporation, who has been induced to subscribe by the assurance of a stockholder that the corporation would not engage in a particular business, does not thereby acquire a right to enjoin such stockholder from voting that the corporation engage in such business. *Converse v. Hood*, S. Jud. Ct. Mass., June 20, 1889.

CRIMINAL LAW.

Insane delusion is an incorrigible belief, not the result of reasoning, in the existence of facts which are either impossible absolutely or are impossible under the circumstances of the individual, and such delusion will not excuse crime, unless the imaginary facts would, if true, render such crime excusable. *State v. Lewis*, S. Ct. Nev., Sept. 12, 1889.

Insanity, as a defence to crime, must be established by a preponderance of evidence, and a man who has sufficient reason to know that the act he is doing is wrong and deserves punishment, is legally of sound mind, and is criminally responsible for such act. *Id.*

DEBTOR AND CREDITOR.

Agreement by indorsee of a promissory note, releasing a joint maker from all liability, upon the payment of a part of the note, is without consideration and void. *Bender v. Been*, S. Ct. Iowa, Oct. 3, 1889.

Mortgage given by insolvent upon his entire stock of goods to certain specified creditors, all of whose claims were past due, authorizing the mortgagees to take immediate possession of the goods, sell them at private sale and apply the proceeds to the payment of their claims; constitutes a general assignment for the benefit of creditors. *Richmond v. Mississippi Mills*, S. Ct. Ark., June 22, 1889.

EQUITY.

Reconveyance of property transferred to an agent, for the purpose of defrauding the creditors of the grantor, will not be decreed by a court of equity to be made to the grantor after the fraud has been accomplished; equity cannot be invoked to give relief to either party from the consequences of a fraudulent agreement. *Dent v. Ferguson*, S. Ct. U. S., Oct. 28, 1889.

ERROR.

Decree perpetually enjoining the entering upon or removing minerals from certain land, and ordering an account to be taken of the minerals already removed, is not a final decree and cannot be appealed from. *Keystone Manganese and Iron Co. v. Martin*, S. Ct. U. S., Nov. 11, 1889.

EXEMPTIONS.

Insurance money, due a debtor upon a policy on his homestead, which has been burned, represents only a personal contract of indemnity between the insurer and himself, and is not exempt from execution under a law exempting the homestead. *Smith v. Ratcliff*, S. Ct. Miss., June 3, 1889.

FIRE INSURANCE.

Assignment of fire policy to a purchaser of the insured property, duly assented to by the company, creates a new contract between the company and the assignee, which is not affected by a default of the assignor before the assignment amounting to a forfeiture of the policy. *Continental Ins. Co. v. Munns*, S. Ct. Ind., Sept. 17, 1889.

Breach of warranty in a fire policy covering two buildings, which only affects one of such buildings, will not prevent recovery for a loss sustained on the other building. *Pickels v. Phoenix Ins. Co.*, S. Ct. Ind., June 6, 1889.

Certificate of magistrate or notary public nearest to the place of the fire, when required by a policy to be furnished as part of the proofs of loss, requires the production of such certificate from the nearest officer of the classes named, whether magistrate or notary. *Williams v. Queen's Ins. Co.*, U. S. C. Ct., D. Conn., June 24, 1889.

Policy covering both real and personal property is not avoided as to the personalty by the insured placing an incumbrance upon the real estate, without notice to the insurer, in violation of a condition of the policy. *State Ins. Co. v. Schreck*, S. Ct. Neb., Oct. 4, 1889.

FIXTURES.

Baker's oven, erected by a tenant, which is so attached to the building that it cannot be severed without destroying its character, reducing it to a mere mass of crude materials, and doing substantial injury to the building, is a permanent attachment to the realty, and cannot be removed as a trade fixture. *Collamore v. Gillis*, S. Jud. Ct. Mass., Sept. 4, 1889.

GIFTS.

Valid gift inter viros was constituted where a married woman, having some \$6000 in her name in a savings bank, in accordance with a previously expressed intention directed the bank teller to transfer \$1500 to each of three nieces, which he did, charging her account with \$4500; on her desire that the bank-books should be so made that the money could not be drawn during her life, the teller endorsed on each of them: "Only Mrs. C. has power to draw;" she and her nieces then wrote their names in the signature book, the word "Trustee" being added by the teller to that of the aunt, and the books were given to the latter, who during her lifetime declared that she was trustee as to this money for her nieces. *Miller v. Clark*, U. S. C. Ct., D. Conn., Oct. 5, 1889.

HUSBAND AND WIFE.

Assignment for the benefit of creditors cannot be made in Wisconsin to a married woman, for the reason that she is incompetent under the laws of that State to bind herself by executing, as such assignee, the bond required by law. *T. T. Haydock Carriage Co. v. Pier*, S. Ct. Wis., Oct. 15, 1889.

Contract by wife to support her husband, in consideration of a conveyance made by him to her, is void. *Corcoran v. Corcoran*, S. Ct. Ind., May 14, 1889.

INFANTS.

Testamentary guardian for an illegitimate child cannot be appointed by its father. *Ramsay v. Thompson*, Ct. App. Md., Nov. 14, 1889.

LANDLORD AND TENANT.

Damages may be recovered by a lessee from his lessor, who has failed to deliver possession of the premises leased, for the amount of the rent paid and the difference between the rent agreed on and the value of the term, together with such special damages as the circumstances might show him entitled to, but not for amounts paid to clerks to release their contracts and to merchants to take back goods bought, unless it appears that the sums paid were reasonable and the obligations to pay were entered into in good faith. *Cohn v. Norton*, S. Ct. Err. Conn., Sept. 13, 1889.

"*Working the quarry*" in a lease providing for forfeiture for "not working the quarry for a space of three successive months," includes in its meaning the removal of water which has flooded the quarry. *Miller v. Chester Slate Co.*, S. Ct. Pa., Nov. 4, 1889.

LIFE INSURANCE.

Contract of mutual benefit company, whose "particular business and objects" are declared by its certificate of incorporation to be "to give financial aid and benefit to the widows, orphans and heirs or devisees of deceased members, by which the company agrees to pay the member a specified sum upon his arriving at seventy years of age, or having been a member in good standing for twenty-five years, is a contract of life insurance, and is *ultra vires* and void. *Rockhold v. Canton Masonic Mut. Ben. Soc.*, S. Ct. Ill., June 15, 1889.

Policy payable to wife of insured, "heirs, administrators, or assigns," upon the insured surviving his wife, and there being no children, inures to the benefit of his heirs, and not to that of hers. *Lyon v. Rolfe*, S. Ct. Mich., July 11, 1889.

LIQUOR LAWS.

Sale of liquor by a licensed dealer, who receives at his place of business an order from an adjoining county, in which he has no license, which order is filled by delivering the liquor to a common carrier designated by the purchaser, is not a violation of law, as the sale is made at the place where the goods were separated from the general stock and delivered to the carrier, and is therefore protected by the vendor's license, and it makes no difference that the goods were shipped to the purchaser "C. O. D." *Fleming v. Commonwealth*, S. Ct. Pa., Nov. 4, 1889.

MASTER AND SERVANT.

Vice-principal is constituted, where a person is clothed by a corporation with the control and management of a distinct department of its business, in which his duty is that of direction and superintendence. *Chicago B. & Q. R. R. Co. v. Sullivan*, S. Ct. Neb., Oct. 22, 1889.

MINES AND MINING.

"Mining ground," as used in a statute, includes a ditch and water-right, by means of which a mine is operated, as an appurtenance of such mine. *McShane v. Carter*, S. Ct. Cal., Sept. 2, 1889.

NEGLIGENCE.

Contributory negligence of parents cannot be imputed to a child of tender years, even in an action by the child's administrator to recover damages for his death, when the parents are the only persons entitled to receive the child's estate. *Wymore v. Mahaska County*, S. Ct. Iowa, Oct. 10, 1889.

Elevator furnished by store-keeper for the convenience of his customers must be of good material, of the kind found safest for the purpose and contain such new inventions as combine greater safety with practical use; the owner of the elevator is a carrier of passengers and is liable for any defect or flaw in the machinery, which might have been discovered on a reasonable and careful examination according to the best known tests reasonably practicable. *Treadwell v. Whittier*, S. Ct. Cal., Sept. 24, 1889.

Letter carrier delivered a registered letter, addressed to a guest at a hotel, to the hotel clerk and took his receipt for it; the letter, which contained money, was lost before delivery to the person to whom it was addressed, and the carrier was required by the post-office authorities to make good the amount of the loss; the carrier had a valid cause of action against the hotel clerk for the amount thus paid. *Joslyn v. King*, S. Ct. Neb., June 13, 1889.

Municipal corporation, which, without authority, grants a license to a grocer, allowing him, on payment of a fee, to keep his delivery wagon standing in the street, in front of his store, day and night, is guilty of permitting a public nuisance, and is liable in damages for any injuries resulting to a passer-by by reason thereof. *Cohen v. Mayor, etc., of New York*, Ct. App. N. Y., June 4, 1889.

Private bridge was built by the owner of an island in a river, to connect his premises with a highway on the mainland; this bridge was used more or less by the public, but without any invitation from the builder to use it, or any advantage accruing to him from such use, and it had become defective, its dangerous condition being very apparent; the builder owed no duty to a person going upon such bridge uninvited and for his own pleasure, and was not liable for injuries sustained by such person by reason of the defects in the bridge. *Cusick v. Adams*, Ct. App. N. Y., June 4, 1889.

Remaindermen, who come into possession of wharf property, which is subject to a valid outstanding lease and which was defective and out of repair when the lease was executed, are not liable, in the absence of express notice of such defects, for the death of a person resulting therefrom during the continuance of the lease, although the lease gives the lessors the privilege of entering upon the premises to make repairs, if they see fit to do so. *Ahern v. Steele*, Ct. App. N. Y., Oct. 8, 1889.

NEGOTIABLE INSTRUMENTS.

Promissory note, containing a stipulation for its renewal at maturity at the option of the payee or holder, is not negotiable. *Coffin v. Spencer*, U. S. C. Ct., D. Ind., July 20, 1889.

PATENTS.

Device used for gambling purposes exclusively is not a useful invention within the meaning of the patent laws, and a patent granted for such device will not be protected by the courts. *National Automatic Device Co. v. Lloyd*, U. S. C. Ct., N. D. Ill., Sept. 23, 1889.

Letters patent granted by the United States, after an English patent for the same invention has lapsed and become void, are without force or authority of law. *Huber v. N. O. Nelson Mfg. Co.*, U. S. C. Ct., E. D. Mo., May 25, 1889.

PUBLIC LANDS.

Fence erected by an owner of lands wholly within the limits of his own property, is not within the statutory prohibition of the inclosure of public lands by persons having no claim nor color of title to the lands so inclosed, even though such fence may happen to actually inclose certain public lands. *U. S. v. Douglas-Willan Sartoris Co.*, S. Ct. Wy., June 6, 1889.

Shore or tide lands not disposed of by the United States prior to the admission of a Territory into the Union as a State, become the property of such State. *Case v. Loftus*, U. S. C. Ct., D. Or., Aug. 26, 1889.

Statute of limitations begins to run against one who claims public lands as the grantee of the United States in favor of one in possession, claiming to have acquired title from such grantee, from the date of the grantee's certificate of final proof and payment. *Steele v. Boley*, S. Ct. Utah, Oct. 5, 1889.

PUBLIC OFFICERS.

Contract with county treasurer, made by the board of supervisors, by the terms of which he is to collect all delinquent personal property taxes, and receive as compensation a stipulated per cent. of the interest and penalties on such taxes, is against public policy and void. *Adams County v. Hunter*, S. Ct. Iowa, Oct. 7, 1889.

Keeper of county jail of a State, who receives prisoners committed to his custody by a United States Court, and is paid for their maintenance, is, for the purpose of keeping and caring for such prisoners, an officer of the court, and may be punished by an attachment for contempt, if he inflicts cruel or unusual punishments on such prisoners. *In re Birdsong*, U. S. D. Ct., S. D. Ga., June 29, 1889.

RAILROADS.

Telegraph operator, employed by a railroad company, is not a fellow-servant with a brakeman. *Hall v. Galveston, H. & S. A. Ry. Co.*, U. S. C. Ct., W. D. Tex., May 25, 1889.

Workmen in proximity to track of a railroad, who are engaged in grading a new track alongside of and parallel to the original or main track, are entitled to receive proper signals of the approach of trains upon the latter, and the duty of the railroad company is the same in this respect, whether the workmen are in its employment or in that of its contractor. *Erickson v. St. Paul & D. R. R. Co.*, S. Ct. Minn., Oct. 18, 1889.

REMOVAL OF CAUSES.

Cause removed from State Court on the ground of diverse citizenship will be remitted by the Supreme Court of the United States to the Circuit Court with directions to remand it to the State Court, even after the trial and the prosecution of writs of error, when it appears from the record that the citizenship of the parties at the commencement of the action, and at the time of filing the petition for removal, was not sufficiently shown. *Jackson v. Allen; Brown v. Allen*, S. Ct. U. S., Oct. 28, 1889.

Suit by alien cannot be removed to the Federal Courts on the ground of local prejudice, the privilege of removal on this ground being given only in controversies between citizens of different States of the United States. *Cohn v. Louisville, N. O. & T. R. R. Co.*, U. S. C. Ct., S. D. Miss., July 6, 1889.

REVENUE LAWS.

Insertion of additional charges on entries and invoices, by the importer, in order to avoid onerous penalties imposed by the appraisers for their omission, renders the payment of the increased duties caused thereby involuntary, although such penalties may be illegal. *Robertson v. Franks*, S. Ct. U. S., Oct. 28, 1889.

Vessel driven ashore by stress of weather has not "arrived" within the limits of the collection district within the meaning of the United States statutes, and the unloading of her cargo, without authority of the customs officer, does not subject it to forfeiture. *The Cargo ex Lady Essex*, U. S. D. Ct., E. D. Mich., July 15, 1889.

SALE.

Agreement to purchase goods to be manufactured at a specified price, cannot be rescinded by the purchaser, after receiving a portion of the order, but the vendor may proceed to manufacture and tender the residue of the goods ordered, and if not accepted, may resell them at public auction at the place of delivery, after notice to the purchaser; such sale, when fairly made, with reasonable diligence, judgment and care, will be evidence to fix the market value of the goods. *John A. Roebling's Sons Co. v. Lock-Stitch Fence Co.*, S. Ct. Ill., Oct. 31, 1889.

Executory contract of sale required the vendor to deliver iron of a specific quality on board steamers at Liverpool to be sent to the vendee in New York; in the absence of any express agreement to the contrary, the vendee's right of inspection continued until the iron arrived at New York, and the carrier was not his agent to accept the iron as corresponding to the contract. *Pierson v. Crooks*, Ct. App. N. Y., Oct. 8, 1889.

Notice of rejection was given the vendor one month after the arrival of the first lot of iron, which was delivered in three shipments, each being inspected within ten days after its arrival; the delay in inspection and rejection was not so great as to be unreasonable as a matter of law. *Id.*

Title to certain bags of coffee purchased on credit and by the pound out of a large number stored in a warehouse, where the bags are so marked as to be easily identified and nothing remains to be done except to weigh the coffee, in order to determine the price, vests immediately in the purchaser. Sanger v. Waterbury, Ct. App, N. Y., 2d Div., Oct. 22, 1889.

SLANDER.

Statement by physician that he had sent some of the silk thread used in a certain manufactory to the State Board of Health for examination, and that the Board had reported that the thread contained arsenic in sufficient quantities to be dangerous to the workmen using it, is not such a statement as would place every one hearing it under such a moral obligation to repeat it that the physician must be held to have contemplated and authorized its repetition until it reached the workmen. Elmer v. Fessenden, S. Jud., Ct. Mass., Nov. 26, 1889.

Statements made by a stockholder of a railroad company before a stockholders' meeting, attributing drunkenness and incapacity to one of the officers of the company, are privileged, if made in good faith, and the fact that attorneys of the company, who are not stockholders, are present at the meeting, does not take away the privilege. Broughton v. McGrew, U. S. C. Ct., D. Ind., June 9, 1889.

SUNDAY LAWS.

Contract for advertising in the Sunday edition of a newspaper is void, as the issuing, publishing and circulating of a newspaper on Sunday, not being a work of necessity or charity, is unlawful, and such contract, being void because it stipulates for doing what is unlawful, is incapable of ratification. Handy v. St. Paul Globe Publishing Co., S. Ct. Minn., July 8, 1889.

Whether shaving a man on Sunday for hire is a work of necessity, is a question to be submitted to the jury. Ungericht v. State, S. Ct. Ind., June 19, 1889.

TELEGRAPHS.

License tax cannot be imposed by either State or municipal authority upon a telegraph company, whose lines are used for the transmission of messages to all parts of the United States, and are thus instruments of interstate commerce. City of St. Louis v. Western Union Tel. Co., U. S. C. Ct., E. D. Mo., June 19, 1889.

Message to physician was not delivered promptly, causing delay in his reaching the patient; it was a question for the jury whether the patient was injured by the delay and whether the result would have been different had the message been promptly delivered; and where the non-delivery was occasioned by the observance of certain rules as to closing the receiving office, the reasonableness of such rules was also for the jury. Brown v. Western Union Tel. Co., S. Ct. Utah, June 21, 1889.

TELEPHONES.

Acknowledgment of deed by a married woman through a telephone, when three miles distant from the notary public, is valid, where there is no allegation of fraud, duress or mistake, and evidence in

contradiction of the notary's certificate, made out in due form, is not admissible, in the absence of any such allegation. *Banning v. Banning*, S. Ct. Cal., Sept. 2, 1889.

Contract with owner and licensor of the patent under which a telephone company operates, that it will furnish telephonic facilities to a certain telegraph company, to the exclusion of all other telegraph companies, is void, and the telephone company must furnish equal facilities to all persons or corporations applying to it. *Commercial Union Tel. Co. v. New England Telephone, and Tel. Co.*, S. Ct. Vt., June 27, 1889.

TRADE-MARKS.

"*Cough cherries*," as applied to a confection, are not descriptive of the qualities of the article, but are sufficiently arbitrary and fanciful to be appropriated as a trade-mark. *Stoughton v. Woodward*, U. S. C. Ct., W. D. Wis., Aug. 6, 1889.

USURY.

Mortgagee, whose mortgage recites that it is subject to a ground-rent of a specified amount and who buys in the mortgaged property under foreclosure proceedings, cannot subsequently set up as a defence to such ground-rent that it was a mere device to conceal a usurious loan to the original owner of the land. *Fulford v. Keerl*, Ct. App. Md., Nov. 15, 1889.

VERDICT.

In action on contract a verdict "for plaintiff," without stating for what amount, is fatally defective, and, after it has been recorded and the jury has separated, it cannot be amended by the court. *Gaither v. Wilmer*, Ct. App. Md., Nov. 15, 1889.

WILLS.

Bequest to daughters of testator, to take effect "in the event of any of my said daughters becoming a widow, or otherwise becoming lawfully separated from her husband," is not void as against public policy, upon the ground that it encourages the legatees to become separated from their husbands. *Born v. Horstmann*, S. Ct. Cal., Sept. 20, 1889.

Direction by testator that her executor shall carry on a mercantile business for the benefit of her son, and shall have power "to sell or make such other disposition of my real and personal estate as the safe conduct of such business shall seem to require," subjects the general assets of the estate to the payment for goods purchased on credit by the executor, in the course of carrying on such business. *Willis v. Sharp*, Ct. App. N. Y., June 4, 1889.

Legatee, who has killed the testator for the purpose of preventing the revocation of a will made in his favor, cannot take under such will. *Riggs v. Palmer*, Ct. App. N. Y., Oct. 8, 1889.

Unsoundness of testator's mind will not in itself prevent a will from being adjudged valid, when it appears that such unsoundness did not affect the character of the will. *Durham v. Smith*, S. Ct. Ind., Oct. 29, 1889.

JAMES C. SELLERS.

INDEX.

ACCIDENT INSURANCE.

ACCIDENTAL.

Is properly defined as "happening by chance; unexpectedly taking place; not according to the usual course of things, or not as expected." 665.

Death caused by jumping from a platform, four or five feet from the ground, is accidental. 665.

ACCIDENT.

It is not essential that a person injuring another should not mean to do so, in order to render the injury accidental. 42, 44.

Injury caused by violent running is not the result of accident. 46.

Death caused by stroke from the handle of a pitchfork, which the insured was using, is accidental. 47.

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Hanging one's self, while insane, is death by external, violent and accidental means. 51.

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When the insured is found shot through the heart, the burden is upon beneficiary to show that the death was accidental. 55.

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EXPOSURE TO DANGER.

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Shoveling snow from a crossing by a railroad employe, is not "unnecessary exposure to danger." 52.

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Where a policy excepts death or injury while the insured is "under the influence of intoxicating drink," and the insured, while intoxicated, is shot by another person, although no connection exists between the intoxication and the injury, recovery cannot be had on the policy. 47.

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RAILWAY EMPLOYEES.

Exemption of, from a clause in a policy, excepting from its benefits injuries which result from being upon the platforms of moving

ACCIDENT INSURANCE—(continued.)

cars, does not apply to a shop-hand of the company, who is killed while on his way home from work. 785.

SUICIDE. See VIOLATION OF LAW.

Death by poison self-administered avoids a policy, which provides that it shall be void if insured "shall die by his own hand." 46.

Death from whiskey taken without the intention of destroying life, is not covered by the words, "die by his own hand." 51.

Unintentional and accidental self-killing is not suicide, voluntary or involuntary. 52.

Suicide, while insane, avoids policy providing that it shall become void, if the assured shall commit suicide, "sane or insane." 56.

But is not within an exception in an accident policy of death by suicide, or death resulting from bodily disease. 569.

VIOLATION OF LAW.

No recovery can be had upon a policy which excepts death while "engaged in known violation of the law," where the insured is killed, while committing an assault and battery. 50.

Injury must be the natural and legitimate consequence of the violation of law. 51.

One who is shot in an attempt to escape, after committing a robbery, is not killed while violating the law. 52.

Suicide is not such violation of the law as will avoid a policy, even if committed to escape arrest for crime. 56.

VOLUNTARY EXPOSURE TO DANGER.

Is not chargeable to a passenger on a railway train, who goes upon the car platform, when overcome by heat and suffering from nausea. 785.

ADMIRALTY. See SHIPPING.

BRIDGE.

Damage to passing vessels by a draw over navigable waters, is within admiralty jurisdiction. 500.

CHARTER-PARTY.

Stipulation in, that all disputes shall be settled at the port of discharge only, is void. 785.

DAMAGES.

For death caused by negligence on the high seas cannot be recovered in the admiralty courts of U. S., even though the vessel proceeded against is a foreign one. 444.

For death of one injured while engaged in loading a vessel, cannot be made the subject of a libel, in the absence of any statute giving a maritime lien for such damages. 785.

LEX LOCI.

English law governs a proceeding by American citizen for injuries received on an English vessel in English waters. 120.

LIMITATION.

Laches will, by analogy, bar a claim, which would be barred at law under the statute. 120.

Of year and day, fixed by Statute of Westminster, begins to run from the time when the goods are actually taken by the finder. 569.

LIMITED LIABILITY ACT.

Recovery for personal injuries cannot be had in a common law action against a ship-owner, who has taken appropriate proceedings to obtain the benefit of the Limited Liability Act of 1851. 665.

MARITIME CONTRACT.

Contract to stow is not. 311.

Stevedore's claim for unloading is, but no lien on the vessel is allowed for such services rendered in the home port. 311.

SCOW PLATFORM.

Floating structure, moored beside a wharf, for carts to pass over to a

ADMIRALTY—(continued.)

boat beyond, is not a vessel within the meaning of the maritime law. 500.

STEAMSHIP AT WHARF.

Negligence in permitting deck to be in an unsafe condition, whereby one having the right to pass over it, is injured, is a marine tort. 500.

SUNKEN CARGO.

Is not a wreck of the sea. 570.

TUG.

Must convey a tow to its destination expeditiously, by the most direct customary route and with proper care and skill. 500.

Undertaking to tow raft, is bound to accompany it to the place of its destination, and to see that it is made fast there. 570.

AGENCY. See BANKS, COMMERCIAL AGENCIES, FIRE INSURANCE.**BROKER. See COMMISSIONS.**

Cannot recover commissions for the negotiation of a gambling contract. 311.

COMMISSIONS. See BROKER.

When earned by a real estate broker. 311.

EXTENT OF AUTHORITY.

Ship's husband cannot bind the owners for money borrowed to repair vessel, without express authority. 120.

GOOD FAITH.

Of the highest degree is required of an agent in dealings with his principal. 251.

REVOCATION.

Interest is not coupled with authority, so as to prevent revocation, where agency is to loan money and collect the interest thereon upon commission. 57.

UNDISCLOSED PRINCIPAL.

Is liable for goods sold his agent on credit. 311.

ALIENS.**EXCLUSION.**

May be made by Congress, even in times of peace. 665.

LANDS.

In the District of Columbia cannot be inherited by an alien. 444.

NATIVE OF HAWAIIAN ISLANDS.

Cannot be naturalized. 785.

ANIMALS. See CONSTITUTIONAL LAW.**TRESPASS.**

Owner of vicious animal, running at large, is liable for damage done to other stock, even though the latter are also trespassing. 63.

ARBITRATION.**FRAUD.**

May be set up in avoidance of the decision of an arbiter, where there is no collusion. 121.

INCOMPLETE AWARD.

Not covering all matters submitted, is void. 444.

PENALTY.

Action for, cannot be sustained under an agreement "to abide by and perform the award" fixing a boundary line, where a party subsequently erects a fence beyond the line fixed. 120.

ARREST.**DAMAGES.**

For assault and battery may be recovered from an officer of the law for the use of unnecessary violence in making an arrest. 500.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS. See DEBTOR AND CREDITOR, MARRIED WOMEN.

ATTORNEY-AT-LAW. See **BILLS AND NOTES, CHAMPERTY AND MAINTENANCE, CONTRACTS, EVIDENCE.**

ADMISSION TO PRACTICE.

Is a judicial, not ministerial, act, and cannot be controlled by the Legislature. 121.

AUTHORITY.

To collect a distributive share in an estate, does not extend to binding the distributee by an agreement to refund to other distributees any amount overpaid upon a partial distribution. 729.

CONFIDENTIAL COMMUNICATIONS.

Between attorney and client, cannot be given in evidence to establish the fraudulency of the latter's deed. 381.

But communications of client are admissible in evidence in a contest over the client's will, for the purpose of laying a foundation for the admission of the attorney's opinion as to the testator's sanity. 570.

DISABILITY.

An attorney, who has formerly acted for a plaintiff, will not be allowed, upon a subsequent trial of the same case, to appear for the defendant. 244.

Attorney is not permitted to serve professionally both parties to a suit. 246.

Nor to use information gained in the course of his professional employment, for the benefit of the opposite party. 246.

But where the information has been acquired in the course of other business, there is no disability. 246.

And an attorney may draw a contract while representing both parties. 247.

Attorney is not permitted, as a rule, to act in diverse capacities. 247.

When he may and may not thus act. 247-8.

ILLEGAL CONTRACT.

Agreement by attorneys, for a stated monthly compensation, to defend cases brought against liquor sellers for the violation of prohibitory laws, is against public policy and void. 500.

INCONSISTENT EMPLOYMENT.

Effects of an attorney's appearing on both sides of a case, or in diverse capacities, are threefold:

(1) It is error for which reversal may be had on appeal. 248.

(2) It will prevent the attorney from recovering his fees and charges in the case. 248-9.

(3) It may be good ground for disbarment. 249-50.

LIABILITY TO CLIENT.

In the absence of a special contract, an attorney is not an insurer of the result of litigation which he undertakes, but is bound only to ordinary skill, care, intelligence and diligence, and good faith. 529.

But the question as to whether an attorney has been guilty of negligence, under the circumstances of a particular case, is a question of fact, and must be submitted to the jury. 529, 542.

An attorney, who has procured a settlement of a case, cannot be charged with the damages sustained by his client by reason of the bringing of a second suit against him for the same cause of action, but through no fault on the part of the attorney. 529.

An attorney is liable to his client for gross negligence, or gross ignorance, in the performance of his professional duties. 536.

What is gross negligence. 536.

Distinction in England between liability of counsel and attorneys, but not in U. S. 537.

An attorney is not liable for a mistake in a doubtful point of law. 537.

Nor for the wrong construction of a doubtful statute. 537.

Nor for accepting a decision of the Supreme Court as a correct exposition of the law. 537.

ATTORNEY-AT-LAW—(continued.)

But he is liable for errors in conveyancing. 537.

And for the failure to record a mortgage, left with him for that purpose. 537-8.

A conveyancer is not liable for errors of judgment. 538.

An attorney is liable for mistakes of well known principles and rules of law. 538-9.

Though he may be relieved by the assent of his client. 539.

For mistakes negligently made in drawing papers and pleadings. 539.

For negligence in bringing, prosecuting or dismissing a suit. 540-1.

For giving plainly erroneous advice. 541.

For failure to follow his client's instructions. 542.

For the negligence or fraud of another attorney, whom he employs as his agent. 542-3.

Or of his partner. 542.

For commencing, or defending, a suit without authority. 543.

For acting in excess of his authority. 544.

But he is not liable for not acting as to matters outside the scope of his profession. 544.

Remedy of the client is against the attorney alone. 544.

What is the measure of damages. 545.

An attorney may, by special contract, limit his liability for the negligence or fraud of his agents. 546.

LIEN.

Upon funds, documents and securities of client, cannot be enforced by a judicial proceeding. 121.

Solicitor who, in order to protect his client, redeems with his own funds a mortgage pledged as collateral, and takes an assignment to himself, has a lien superior to that of a third party, holding a prior assignment. 121.

On judgment obtained for client, does not extend to property purchased with proceeds of such judgment. 311.

Consent to the payment of a judgment to the client directly, is a waiver of the attorney's lien. 311.

LIMITATION.

Professional misconduct is not subject to limitation through lapse of time, so far as the power of the Court to punish is concerned. 500.

Statute begins to run against a claim for money collected by an attorney, from the time the collection is made. 570.

SALARY.

Employment of an attorney by a corporation at a fixed salary, which may be changed at the option of the latter, does not prevent his contracting with the corporation for a special fee in a special case. 665.

BAILEMENT. See BILLS AND NOTES.**LIABILITY TO BAILEE.**

Slight care only is required, where the bailment is for the benefit of the bailor, and the bailee can be held liable only for fraud or gross negligence. 381.

BANKS. See BILLS AND NOTES.**ACCOMMODATION NOTE.**

Given to a firm, one of whose members is president of a bank, for the purpose of substituting, the same, during the inspection of the bank examiner, for the firm's paper, discounted by the bank in excess of the limit allowed by law, remains valid in the hands of the bank. 729.

AGENCY.

Deposit by one bank with another, for the purpose of paying a creditor of the former, establishes the relation of principal and agent between the banks, until the creditor assents to or acts upon the trans-

BANKS—(continued.)

action; and where the creditor has no notice nor knowledge of the deposit, his assent will not be presumed. 251.

CAPITAL STOCK.

Can be increased by a national bank only in the manner prescribed by U. S. Statutes, and subscriptions made to an increase of stock, not made in compliance with the statutory provisions, cannot be enforced. 312.

CERTIFICATE OF DEPOSIT.

Under what circumstances a bank becomes liable to a depositor for the amount of a certificate of deposit in another bank, left with the former for collection. 665.

CHECK.

When check is deposited for collection, bank must return either the check or the money. 57.

Proceeds of, collected by one bank for another, which held the check merely as agent for a third bank, belong to the latter. 312.

Payment of, is conclusive upon bank, although made out of the wrong fund. 501.

When certified, renders bank liable for its amount, although certified in violation of law. 570.

Promise to honor a depositor's checks, when presented, is not a certification within the Act of Congress. 570.

What constitutes acceptance of. 785.

Cannot be cashed by a national bank, through the agency of another bank, at a different place from the location specified in its organization certificate. 785.

Refusal to honor, without legal cause, entitles the depositor to substantial damages. 786.

COLLECTIONS.

Made by one bank for another and mingled with the funds of the former, which becomes insolvent before remitting, do not entitle the latter bank to a preference for the amount of such collections over the claims of other creditors. 501.

But otherwise, when the collections are made by the surviving partner of a banking firm upon checks drawn by depositors with the firm. 501.

Proceeds of, made by one bank for another, but not remitted before the insolvency of the former, can be recovered from its receiver, if it can be proved that such proceeds have passed into the receiver's hands. 785.

DEPOSIT.

Paper of depositor, held by bank for collection, may be paid out of his deposit, even after an assignment for the benefit of creditors by the depositor. 57.

DIRECTORS.

Are not liable for illegal acts of officers. 121.

EXCHANGE PURCHASES.

What is included in the term "exchange purchases," when used in a contract between two banks. 444.

EXTENSION OF CHARTER.

Of national banking association, does not create a new corporation, but simply extends the life of one already existing, which consequently remains liable upon prior contracts. 729.

FORGED INDORSEMENT.

Bank is responsible for the payment of a check with a forged indorsement, even though a subsequent indorsement is genuine, 121.

INSOLVENCY.

Fraudulent receipt of deposits gives the depositor no preference over other creditors. 570.

BANKS—(continued.)**LIQUIDATING NATIONAL BANK.**

May, after the expiration of its charter, continue to elect officers and directors for purposes of liquidation, but its stock cannot be transferred, so as to give a transferee the right to vote or serve as director. 188.

NOTE OF DEPOSITOR.

Cannot be paid by bank, in the absence of a usage or of instructions from the maker to that effect. 312.

STOCK ASSESSMENTS.

Pledgee of stock is not an owner, and, upon insolvency of bank, is not liable for unpaid instalments on the stock pledged. 121.

Nor is purchaser of stock at a sheriff's sale, which passes no title. 122.

STOCKHOLDER.

Who has made a *bona fide* sale of his stock, and has taken all necessary steps to secure its transfer, is not liable for a subsequent assessment, though the cashier failed to actually make the transfer on the books. 786.

USURY.

National bank, deducting illegal interest, can recover only the face of note, less the interest deducted. 57.

BANKRUPTCY. See INSOLVENCY.**LANDS.**

Sale by assignee, without an order of court, does not discharge incumbrances. 57.

BICYCLES.**HIGHWAY.**

Rider of a bicycle has equal rights upon the highway with a person in a carriage drawn by horses. 786.

RIDING AGAINST PEDESTRIAN.

Is an assault and battery. 312.

BILLS AND NOTES. See BANKS.**ACCEPTANCE.**

Of draft, not yet signed by the drawer, renders the acceptor liable to an indorsee for value. 188.

Of draft to be drawn for \$2000, does not cover a draft for \$2000, "with exchange." 251.

Of draft, drawn on executor in his official capacity, made by him as executor, does not bind him individually. 570.

ACCOMMODATION INDORSER.

Who meets the debt when legally charged with its payment, is a holder for value. 786.

ACCOMMODATION PAPER.

Agreement by payee that an accommodation note shall be discounted in bank, is no defence to a suit against the maker by a private person who discounted it with express notice of such agreement. 501.

May be rescinded at any time before passing into the hands of a third party for value. 571.

AGREEMENT TO RENEW.

Written across the face of a note, destroys its negotiability. 729.

ALTERATION.

By raising the amount of a note, does not render the maker liable to a holder for value, although blank spaces were left in the original note, sufficiently large to insert the forged words and figures. 501.

By maker, in amount, date and interest of a note, releases an indorser from all liability. 501.

When immaterial, does not affect the validity of a promissory note. 666.

BILLS AND NOTES—(continued.)**COLLATERAL PLEDGE.**

Of negotiable paper, imposes upon the pledgee the obligation to use reasonable and ordinary care and diligence in its collection. 381.

COMMISSIONS.

Stipulation in note to pay "costs of collecting the same, including attorney's commissions," is valid. 189.

CONDITION.

Note given subject to approval of an attorney, becomes void when that approval is refused. 122.

CONSIDERATION.

Burden of proof is on party alleging want of. 57.

Failure of, occurs where a note is given as a retainer to attorneys by one accused of crime, and, before trial, the maker is killed by a mob. 57.

Want is shown, where the payee agrees not to hold the indorser, but to look to the maker alone. 58.

But an oral agreement that, if the maker assign for the benefit of creditors, the payee will accept the amount paid under the assignment in full, will not be enforced. 58.

CORPORATION NOTE.

Executed by the president in his own favor, is in itself sufficient to charge an indorsee with notice of any want of authority to execute it. 445.

CREDIT THE DRAWER.

Written on the face of a note by an indorsee, implies no promise nor undertaking on his part. 502.

DELIVERY.

What evidence is insufficient to establish the delivery of a promissory note by father to son. 251.

DEMAND NOTE.

Delay of ten months in presenting and giving notice of non-payment, will discharge the indorser. 786.

• **DRAFT ON BANK.**

Payable on a day subsequent to its date, is a bill of exchange and entitled to days of grace. 786.

HOLDER FOR VALUE.

Is constituted, where one takes a note in part satisfaction of an existing debt, also releasing valuable liens. 122.

INDORSEE FOR COLLECTION.

May maintain an action in his own name upon a promissory note. 786.

INDORSEMENT.

Of promissory note by trustees in their own names, adding "Trustees Estate of —," renders them personally liable. 444.

Before maturity, is necessary to clothe the transferee with the rights of an innocent holder for value. 502.

In blank, and delivery for a special purpose, precludes any other use of the note, and it cannot be applied by the holder to the payment of an admitted debt of the maker to him. 502.

"For collection on account," does not render the indorsee a *bona fide* holder for value. 729.

INDORSER.

Cannot be sued by a holder who has assigned a judgment obtained against the maker upon the same note. 312.

In blank, under the name of the payee, *prima facie* assumes the obligation of a maker. 312.

Who repossesses himself of the note which he has indorsed, is relegated to his original position, and neither he, nor a purchaser from him, can hold intermediate indorsers. 502.

Not named as payee, but who puts his name on the back of a

BILLS AND NOTES—(continued.)

note before delivery to the payee, on the faith of which money is loaned or credit given by the payee to the maker, is liable on the note as an original promissor. 729.

INTEREST.

When stipulated rate of interest upon a promissory note cannot be collected. 786.

IRREGULAR INDORSEMENT.

Second indorser, who writes his name before that of prior indorser, cannot recover from the latter. 58.

JOINT MAKERS.

It may be shown by parol that one joint maker is the principal debtor, and that the others are his sureties. 58.

One joint maker is not released by the other making a payment on account and giving a new note for the balance. 251.

It may be shown by parol that one of two joint makers of a note drawn "to the order of myself," was intended as sole payee. 502.

LEX LOCI.

Determines the validity of a note given in pursuance of a wagering transaction. 188.

NEGOTIABILITY.

Is taken away from a promissory note by a stipulation to pay principal and interest, "with exchange on New York." 571.

NOTICE OF PROTEST.

Is insufficient, where the notary asks the teller of the bank, where the indorser resides, and, not receiving the desired information, mails his notice, without further inquiry, to the place where the note is dated. 58.

What is sufficient. 188, 251.

When sufficient under the Massachusetts statute. 571.

PAROL EVIDENCE.

Is not admissible to show promises to secure another signature and collect subscriptions, made by the payee, when the note, which was for moneys advanced to pay a church debt, was given, which promises were not fulfilled. 571.

PATENT-RIGHT.

Note given for, in violation of a statute making the giving of such note a misdemeanor, is good in the hands of a *bona fide* holder for value. 571.

PRESENTMENT.

Will be excused, where the maker removes after giving the note, and his new residence is unknown to the holder. 58.

RENEWAL NOTE.

Is not a satisfaction of the original note, unless there is an express or implied agreement to that effect. 571.

BILLS OF LADING.**CONSIGNER.**

Must watch for the ship's arrival and be ready to receive the goods at the time and place of delivery, when the bill of lading so stipulates. 786.

EXEMPTION OF CARRIER.

From liability for loss caused by the negligence of its servants, will be held invalid in the Federal courts. 444.

From loss by perils of the sea, does not cover a loss caused by one of such perils, to which the negligence of the carrier's servants contributed. 444.

INSURANCE.

Stipulation that, in case of loss, the carrier shall have the benefit of insurance on goods, does not entitle the latter to receive such benefit, before suit brought for a loss, nor can the failure to allow such benefit

BILLS OF LADING—(continued.)

be set up as a counter-claim, unless the shipper has actually received the insurance money and refused to credit it on his claim. 251.

INTERMEDIATE CARRIER.

Does not receive the benefit of a stipulation in a bill of lading, the terms of which do not extend it beyond the carrier receiving the goods shipped. 572.

LIMITATION OF LIABILITY.

Will not control, where there has been negligence on the part of the carrier, and no lower rate of freight has been charged. 571.

STATION AGENT.

Has no authority to issue bills for property not delivered to him, and the railroad company is not liable upon a bill so issued, though in the hands of an innocent holder for value. 502.

THROUGH BILL.

Containing two sets of conditions, the first relating to land carriage by railroad and the second to ocean transportation by steamer, does not empower the owner of the steamer to avail itself of the provisions of the first set. 444.

VERMIN.

Exemption of damage by, does not extend to damage done by rats, resulting from the negligence of the vessel-owners in omitting to fumigate the ship. 787.

CANALS.**ESCAPING WATER.**

What is sufficient evidence of injury by. 502.

CHAMPERTY AND MAINTENANCE.**CONTINGENT FEE.**

For prosecution of an Alabama Claim, is not illegal. 189.

CHARITIES.**CHARITABLE GIFT.**

Definitions of. 185.

CY PRES.

When the doctrine of *cy pres* will not be applied. 787.

DISSOLUTION.

On the dissolution of an eleemosynary corporation, having neither debts nor stockholders, the title to its land reverts to the original owner. 787.

GENERAL RULE.

Where bequests are contrary to public policy, or where they tend to break down or change existing laws in the particular community, they are void. 187.

PUBLIC CHARITY.

A corporation, without capital stock, declaring no dividends and making no profits, which is maintained by the voluntary contributions of fire insurance companies and agents, and the object of which is to protect and save life and property in or contiguous to burning buildings in a municipality, and to remove and take charge of such property, is held in Pennsylvania to be both an auxiliary to the municipal government and a public charity. 672.

And therefore it is not liable for the negligent acts of its employees. 672.

Authorities in support of this doctrine reviewed. 673-80.

Authorities *contra*. 683-5.

How far the doctrine of *Respondet superior* is applicable to a public charity. 680-2.

SENTIMENT OF COMMUNITY.

Is an important factor in determining what is, or is not, a charity. 185.

CHARITIES—(continued.)**SLAVES.**

Prior to the abolition of slavery, bequests for the purpose of emancipating slaves, were not sustained in the slave States. 185, 187.

But otherwise in the rest of the country. 185.

WHAT IS A CHARITY.

Bequest of a fund to perpetuate a useful library, even if composed of a certain class of books, provided they will enlighten and improve mankind. 170.

WHAT IS NOT A CHARITY.

Bequest for distribution of books, in which the author describes as robbery, the system by which landowners hold title to their lands. 170.

Bequest of fund to a Sunday School, the income to be applied to making Christmas presents to its scholars. 185.

In England, a gift to maintain a minister is not good. 186.

Nor for catechising. 186.

Nor to teach dancing or fencing. 186.

Nor for masses. 186.

Otherwise in Ireland. 186.

Nor for bringing up children in the Roman Catholic faith. 186.

Nor to teach natural theology. 186.

Nor to teach the Jewish religion. 186.

Nor to re-establish the supremacy of the Pope. 186.

Nor for the political restoration of the Jews to Jerusalem. 186.

Nor to buy and distribute such books as might have a tendency to promote virtue, religion and the happiness of mankind. 186.

Nor to repair tombs. 186.

Nor to undertakings of general utility. 186.

Nor to ten poor clergymen, to be selected by the trustee. 186.

Nor for the discharge of poachers, committed to prison for the non-payment of fines. 187.

Bequest to diffuse more generally the blessings of education, civilization and Christianity throughout the U. S. and elsewhere, is void. 187.

CHATTEL MORTGAGES.**CONSTRUCTIVE NOTICE.**

Of mortgage on grain in bin or crib, is not given by a recorded mortgage upon the same grain, while growing. 572.

CROP.

May be mortgaged before planted. 189.

DESCRIPTION.

When defective, does not prevent the mortgage being binding upon one who has actual notice of its existence. 572.

What is sufficiently definite and certain. 572.

GOOD-WILL.

Of newspaper cannot be sold under foreclosure proceedings, after all its tangible property is gone. 122.

INSTALMENT LEASE.

Is a conditional sale, not a chattel mortgage. 122.

LIEN OF LIVERY STABLE KEEPER.

Upon horse, is subject to a recorded chattel mortgage. 503.

MACHINERY.

In factory, when mortgaged for the purchase price, will be considered as personal property, as between the chattel mortgagee and a prior mortgagee of the realty. 312.

PRIORITY.

Chattel mortgage, properly executed to secure a *bona fide* debt, takes precedence of a previous real estate mortgage, in which personalty is also mentioned and attempted to be mortgaged, without complying with the statutory requisites. 291.

CHECKS. See BANKS.**PAYMENT OF DEBT.**

By check, when not constituted. 787.

REVOCATION.

May be made at any time before presentation, unless accepted or certified. 312.

CITIZENS.**BIRTH.**

Child born of Chinese parents in U. S. is a citizen, and his father cannot alter his *status*. 58.

Nor is he subject to the Chinese restriction and exclusion Acts. 122.

COPYRIGHT LAW.

State is not a citizen within meaning of. 123.

COMMERCIAL AGENCIES.**COMMUNICATIONS.**

Publications as to the standing of merchants, communicated to subscribers generally, are not privileged. 125.

But such communications are privileged, when made in good faith to one having an interest in the information sought, or when volunteered to one having an interest, if he stands in such relation to the person by whom the communication is made, as to render it proper that the information should be given. 258.

Are not entitled to any greater privilege than communications by other persons. 258.

EMPLOYEES.

Statements made by employees of a commercial agency in the course of its business, are entitled to the same privilege as if made by the proprietor. 260-1.

FALSE REPRESENTATIONS.

When made to a commercial agency with fraudulent intent, and communicated to a subscriber, who is induced thereby to extend credit, are a fraud upon the latter. 263.

LIABILITY TO SUBSCRIBERS.

Commercial agencies are bound to use ordinary care and diligence in collecting information which they furnish to subscribers, and, if they fail to do this, are liable for the damages occasioned. 262.

But they are not liable in Canada for giving false information verbally. 262.

Elsewhere it has been held otherwise. 263.

Liability may be limited by a clause in the contract. 263.

MALICIOUS REPORTS.

Communications, otherwise privileged, are not so, if made with malice in fact. 261-2.

NOTIFICATION SHEETS. See COMMUNICATIONS.

Sent to all subscribers, are not privileged. 257, 260.

SERVICE OF PROCESS.

On correspondent of a commercial agency, who furnishes it with information from a State where it has no office, is sufficient. 263.

COMMON CARRIERS. See BILLS OF LADING, RAILROADS, TELEGRAPHS, TELEPHONES.**FREIGHT.**

Contract to carry, at less than the published schedule, is not an "undue or unreasonable discrimination," unless the privilege is exclusive. 788.

CONSTITUTIONAL LAW. See TELEGRAPHS.**CABINET OFFICERS.**

Are, with their subordinates, subject to the jurisdiction of the courts to compel the performance of ministerial duties. 355.

CONSTITUTIONAL LAW—(continued.)**CHINESE EXCLUSION ACT.**

Is not unconstitutional. 122.

CITIZENSHIP.

Distinction between citizenship of the State and the United States. 130.

COMMERCE CLAUSE.

In Constitution of the United States, has, more than any other one grant of power, helped to establish the Nation. 735.

Such was the intention of the framers of the Constitution. 735.

The constitutional law of the commerce clause to-day is practically the law of the first commerce case decided by the Supreme Court. 735.

Decisions of the Supreme Court of the United States in cases arising under the commerce clause, discussed. 735-47.

Three different views have been promulgated in the Supreme Court as to the extent of the commerce power. 737.

The earlier view. 737.

The non-exclusive view. 739.

The modern view. 740.

The Wheeling Bridge case. 743.

Modifications of the doctrine of the Wheeling Bridge case. 744-5.

While giving due force to the commerce power of Congress, the Supreme Court has maintained the absolute supremacy of the States over their purely internal affairs, free from Federal interference. 745.

CONGRESS.

Has no power to change the office of an army officer, although it may alter his rank. 704.

DELEGATION OF POWER.

Railroad commission, authorized to regulate charges for the transportation of passengers and freight, may be constituted by statute, notwithstanding a constitutional provision forbidding the delegation of legislative power. 252.

FEDERAL COURTS.

May mandamus the Executive of a State. 354.

But not to enforce duties imposed by Congress. 355.

FOURTEENTH AMENDMENT.

Prohibits municipality from appropriating land for a public street and assessing the remaining land of the owners for all costs and expenses, without first making compensation for the land taken. 123.

Does not prohibit the imposition of punitive damages upon a railroad for stock killed, by reason of the failure to fence its track. 123.

Prohibition by State of manufacture and sale of intoxicating drinks does not contravene. 129.

Nor prohibition of manufacture and sale of oleomargarine. 129.

Marks the culmination of the struggle for supremacy of Nation over State. 133.

GOVERNOR OF STATE.

Is not subject to the jurisdiction of the State courts to compel or restrain the performance of any official duty, whether executive or ministerial. 341, 350.

Cannot be enjoined from issuing a certificate of election to membership in Congress. 341.

Nor mandamused to issue a commission to one claiming to be duly elected to an office. 350.

But there is a conflict of authority as to the power of the courts to control the Executive in the exercise of purely ministerial duties. 350-1.

Decisions affirming such power. 351-2, 358.

Decisions denying such power. 352-3-4.

Summary of the decisions. 354.

CONSTITUTIONAL LAW—(continued.)

Decisions discussed. 356-7-8.

Of Indiana, possesses the sole right to fill vacancies by appointment in all State offices of a general character. 687.

INTERSTATE COMMERCE.

Damages may be allowed by a State statute for the loss of cattle by reason of Texas fever, contracted from other cattle, which have not wintered north of the southern boundary of Missouri or Kansas; such status is not a restrictive on interstate commerce. 252.

State statute, prohibiting the taking within the State of orders for spirituous liquors, to be delivered at a place without the State, knowing or having reasonable cause to believe that the same will be transported into the State, is not unconstitutional, as a restriction on interstate commerce. 572.

JUDICIAL OPINION.

Of Supreme Judicial Court of Massachusetts cannot be required by the Legislature as to the construction of a statute, which the Legislature has the power to alter or amend. 572.

LEGISLATURE.

Possesses only such power as the people have delegated to it by the Constitution. 687.

Has no power to create a general State office and fill it by election, unless specially empowered to do so by the Constitution. 687.

A power to prescribe by law the manner in which State officers shall be chosen, conferred by the Constitution, does not authorize the Legislature to elect or appoint such officers directly. 687.

Cannot be given by statute, under the Constitution of Indiana, the power to elect members of boards of control for cities of a specified class. 701.

In California, statutes authorizing the filling of State offices by the Legislature, have been held valid. 705.

So also in Maryland. 705.

In Missouri. 706.

In Nevada. 706.

In New York. 706.

And in Oregon. 708.

But in North Carolina and Ohio, similar statutes have been pronounced unconstitutional. 707.

LICENSE TAX.

Imposed by State on express companies engaged in interstate transportation, is unconstitutional. 788.

LIMITATION ON STATES.

Tendency of Supreme Court of U. S. considered. 131.

In the formative period of the Nation's development, this tendency was centripetal. 131.

And, since the war and the adoption of the amendments, the National principal has been maintained and extended. 133.

But the tendency is now centrifugal. 134.

PRESIDENT OF THE UNITED STATES.

It has never been decided whether the President is subject to mandamus to compel the performance of a ministerial duty. 355.

But he cannot be enjoined from carrying into effect an Act of Congress alleged to be unconstitutional. 355.

REGISTRATION LAW.

Discriminating between persons practising dentistry, is unconstitutional. 788.

STATE SOVEREIGNTY.

To what extent States may legislate, as governments, concerning their own internal affairs. 130.

Where private property is devoted to a public use, it is subject to

CONSTITUTIONAL LAW—(continued.)

State regulation in respect to the charges for such use, imposed on the public. 131.

Sovereignty of State within Nation, as recognized by the Supreme Court of the U. S., is the true State Sovereignty of the Constitution. 140.

STATE STATUTE.

Prohibiting the sale of dressed meat, unless the animal within twenty-four hours before slaughter was inspected by State officers, is unconstitutional. 788.

STATUTE.

Imposing collateral inheritance tax, does not conflict with the Fourteenth Amendment. 503.

Rendering corporation absolutely liable for injuries done to property in the prosecution of its lawful business, does not provide "due process of law." 503.

Forbidding "any agent traveling with one or more horses" to "sell any lightning rod, sewing machine, or organ, or other musical instrument," without a State license, is not unconstitutional. 503.

"Fixing the time for the opening and closing of saloons and gaming houses" does not embrace more than "one subject and matter properly connected therewith." 503.

STATUTORY DAMAGES.

Statute imposing liability upon every railroad corporation which shall damage or kill any horse by running against it with an engine, is unconstitutional. 313.

Statutory limitation of liability of railroads for personal injuries or death sustained through their negligence, does not constitute a contract between the State and an accepting railroad company, and may be repealed. 319.

SUPREME COURT OF THE UNITED STATES.

General view of the development of the Constitution under the interpretation of the Supreme Court. 733-4.

TAXATION.

Exemption from, of township poor-farm may be made by Legislature, although expressly authorized by an existing statute, subsequent to which the poor-farm was conveyed by the township to a municipal corporation. 445.

TRIAL BY JURY.

Misdemeanors, whose punishment involves deprivation of liberty, as well as felonies, are within Art. III. Const. U. S. 58.

Sixth Amendment does not supplant Art. III. Const. U. S. 59.

CONTEMPT OF COURT.**ATTEMPT TO BRIBE JUROR.**

Is a contempt of court. 788.

PUNISHMENT.

When committed in presence of Court, a contempt may be punished without notice to the offender and without a hearing. 123.

CONTRACTS. See HUSBAND AND WIFE.**ACCORD AND SATISFACTION.**

Settlement between attorneys, who have jointly conducted a case, is conclusive, though one is subsequently paid an additional fee by the client. 188.

LEX LOCI.

Where goods are ordered by letter from a dealer in another State, and shipped from there according to order, the contract is not subject to the law of the State where the purchaser resides. 503.

MACHINERY.

Of mill, if not put in according to contract, need not be taken out to

CONTRACTS—(continued.)

avoid payment of the entire contract price, but the measure of damages will be the cost of making it conform to the contract. 504.

RECOVERY.

May be had for part performance, where contract is not entire. 123.

RESTRAINT OF TRADE.

Agreement by a barber not to work for any one beside the other party to such agreement, nor to open shop for himself, in a specified town at any time, is unreasonable and will not be enforced. 503.

Competing firms may agree not to handle certain goods in competition in a specified district, but such agreement will not bind a corporation formed by members of one of such firms and others. 503.

Covenant not to manufacture or sell a secret medicinal compound in certain specified territory, is not contrary to public policy. 666.

COPYRIGHT. See CITIZENS.**APPLICATION FOR LIQUOR LICENSE.**

Is a subject of valid copyright. 313.

PHOTOGRAPH.

Designed to illustrate a musical composition, is infringed by stamping an imitation on leather chair bottoms and backs. 313.

STATE REPORTER.

Opinions and other work of judges published in official reports, issued under authority of a State, are not protected by a copyright taken by the official reporter for the State. 123.

STATUTORY NOTICE.

Omission of year and name, or of either, in the statutory notice of a copyright, bars an action for infringement, even by one who otherwise had express notice. 666.

CORPORATIONS. See BANKS, BILLS AND NOTES, FIRE INSURANCE, LIQUOR LAWS, SLANDER, WATER RIGHTS.**BONDHOLDERS.**

Mortgage bondholders, who subscribe to debenture bonds, the subscriptions to be paid as called for, are not liable as subscribers to capital stock. 189.

BONDS.

Payment of interest cannot be refused on the ground that forged bonds are in circulation and that the bondholder declines to accept new bonds, issued to defeat the forgeries, in exchange for those already held by him. 123.

DEED.

To corporation, signed and acknowledged by the grantor before the charter is granted, and placed in escrow to be delivered upon the grant of the charter, takes effect as a conveyance from the date of such delivery. 504.

DE FACTO CORPORATION.

Contract with, cannot be repudiated on the ground that the corporation is not legally organized, or that the law under which it was organized is unconstitutional. 572.

DIRECTORS.

Of an insolvent corporation, are trustees for its creditors, and cannot secure their own claims against the corporation, so as to gain priority over the other creditors. 788.

JUDGMENT.

Against corporation, is conclusive upon a stockholder. 504.

OFFICERS AND DIRECTORS.

May purchase debts owing to corporation, after an assignment for the benefit of creditors and a sale of its assets. 252.

PRESIDENT.

Authority of, to execute note, discounted for a corporation's benefit, cannot be disputed. 59.

CORPORATIONS—(continued.)**STATUTES.**

Words, "person" or "persons," when used in statutes, include corporations, both private and public. 286.

STOCKHOLDER.

Cannot be enjoined from voting that the corporation engage in a certain business, at the suit of a subscriber to the stock, who has been induced to subscribe by the assurance of the stockholder that the corporation would not carry on such business. 788.

STOCK SUBSCRIPTIONS.

Constitute (1) a contract between the subscribers to become stockholders when the corporation is formed, and (2) a continuing offer to the proposed corporation, which, upon acceptance, becomes a contract as to each subscriber. 300.

Delivery of a subscription paper to the promoter of a proposed corporation by a subscriber renders it a binding contract. 300.

An oral condition, accompanying such delivery, is not binding upon the other subscribers, nor upon the corporation, when formed. 300, 313.

The general rule of evidence that a written contract is not to be contradicted or varied by evidence of a parol agreement, is applied to cases of subscription to the stock of corporations. 306.

There is no distinction in the rule between cases of proposed and existing corporations. 306-7.

Authorities examined. 307-8-9.

The subscription inures to the benefit both of the subscribers and of the corporation, when formed. 310, 313.

But the corporation is the proper party to bring suit. 310.

Subscriber cannot set up fraud of the directors, in order to defeat his contract. 311.

Upon an assignment by a subscriber for the benefit of creditors, his assigned estate is liable upon the whole amount of the subscription, although no calls have been made. 313.

Agreement among stockholders, whose subscriptions have not been made public, made in good faith and before debts have been incurred, to take full-paid stock to the amount actually paid on their subscriptions, instead of the actual amount of stock subscribed for, is valid as against creditors. 381.

Agreement by incorporators to take the shares of one of the subscribers within a fixed time, if he should so desire, and refund his money, made without fraudulent intent, is valid. 666.

ULTRA VIRES.

Unauthorized subscription to stock of one corporation by another is void. 59.

CRIMINAL JURISDICTION.**ACCESSORY.**

Accessory before the fact can be tried only where the act of accessoryship took place. 31.

COUNTY COURTS.

Offences must be tried in the county where the criminal act took place. 29.

FEDERAL COURTS.

Federal Courts have no common law criminal jurisdiction. 22.

By statute their jurisdiction extends to crimes committed:

On High Seas. 23.

" Great Lakes. 23.

In Territories. 24.

" Seat of Government, forts, magazines, arsenals, dock-yards and other U. S. buildings, within the limits of States. 25.

CRIMINAL JURISDICTION—(continued.)**LOCALITY AS AFFECTING JURISDICTION.**

- In abortion. 41.
- " bigamy. 33.
- " burglary. 38.
- " false pretences. 39.
- " forgery. 40.
- " homicide. 33.
- " larceny. 35.
- " libel. 39.

PRESENCE OF CRIMINAL.

Personal presence of offender where the crime is perpetrated, is not always necessary to confer jurisdiction. 30.

STATE COURTS.

States possess exclusive power to punish crimes committed within their own limits, except so far as this power has been surrendered to U. S. 29.

CRIMINAL LAW. See JURISDICTION, LIQUOR LAWS, SUNDAY LAWS.**BURGLARY.**

Is constituted by breaking into a cellar, having no internal connection with the house. 504.

CITIZENS OF U. S.

Resident in a foreign country, under treaty protection and surrendered by the foreign government, because charged with crime, upon the demand of a State governor, after the U. S. Government had refused to ask his extradition, may be tried by the State courts. 445.

CONSPIRACY.

Is triable by a jury at common law and cannot be tried in a police court, even where the right of appeal is given. 124.

EMBEZZLEMENT OF LETTER.

By post-office employe, is constituted, although the letter was a decoy. 504.

CO-DEFENDANT.

Absence of, cannot be used to establish the guilt of the accused. 709.

EVIDENCE.

Narration of transaction, given by injured man a few minutes after its occurrence and after the accused had left, is not admissible in a homicide case as part of the *res gestæ*. 445.

FORMER JEOPARDY.

Reversal and new trial, granted on appeal of defendant, who asked for reversal only, does not bar further prosecution. 59.

Discharge by court, after commencement of trial, for the purpose of trying the prisoner upon another complaint, operates as a bar to another trial for the first offence charged. 382.

Under what circumstances former jeopardy may be pleaded. 504.

When former acquittal is a defence to a prosecution for perjury. 572.

INSANE DELUSION.

Definition of. 789.

Will not excuse crime, unless the imaginary facts would, if true, render the crime excusable. 789.

INSANITY.

Must, to constitute a defence to crime, be established by preponderating evidence. 789.

Does not excuse one who has sufficient reason to know that his act is wrong and deserves punishment. 789.

JUROR.

Is competent to serve in a capital case, notwithstanding an opinion formed from reading newspapers, if he says that he can render a verdict according to the evidence, uninfluenced by such opinion. 505.

CRIMINAL LAW—(continued.)**JURY.**

Drinking of intoxicating liquor by, while deliberating on their verdict, is cause for setting the verdict aside. 445.

MISCONDUCT OF JURY.

The indulgence by the jury, after being charged and retiring, and before agreeing upon their verdict, in wine and cognac, even in a moderate degree, is sufficient ground in California for setting aside the verdict. 709, 725.

But there is a conflict of authority as to the correct rule to be observed under such circumstances. 724.

In Iowa, it has been held that the drinking of intoxicating liquor by a jury, after having retired to consider their verdict, vitiates the verdict, irrespective of the question of their intoxication. 725.

So also in Indiana. 726.

In Louisiana, the Court will consider the question as to whether the amount of liquor drank was sufficient to affect the judgment of the jurors. 724.

In New York, the authorities do not agree. 726.

In Texas, the stringent rule of the California courts was originally adopted, but this has been modified by statute, and the verdict cannot now be set aside on this ground, unless it is shown that a juror has actually become intoxicated. 726.

In Missouri, the verdict will be allowed to stand, unless it be shown that the drinking of liquor affected it, or that the drink was furnished by an interested party. 727.

The same rule has been adopted in Mississippi, Montana and Virginia. 727.

And apparently in Ohio. 727-8.

General rules. 728.

PROSECUTING ATTORNEY.

Has no right to argue at the same time for the admission of evidence, and as to the effect of such evidence, if admitted, and, if permitted by the court to do so, it is error, for which a reversal will be granted. 709.

POSTAL LAWS.

Whether a particular publication is in violation of the postal laws, must be determined by the jury, under instructions from the court as to the meaning of the statutory words. 573.

RAPE.

Unchastity of prosecutrix may be shown, when the defence is consent. 573.

RES GESTÆ.

Statements made by one fatally wounded, immediately after he received his injuries to a person whom he called to his assistance, and ten minutes later to a personal friend, are admissible in evidence on the trial of persons charged with his murder, as part of the *res gestæ*. 730.

DAMAGES. See ADMIRALTY, CONSTITUTIONAL LAW, LIABILITY FOR CAUSING DEATH, PLEADING, RAILROADS, SUNDAY LAWS, TELEGRAPHS.

EXCESSIVE DAMAGES.

A verdict for \$7000, as damages for a rupture sustained by a man fifty-eight years of age, and engaged in the piano trade, earning \$300 per month, is not excessive. 666.

PROSPECTIVE DAMAGES.

May be recovered in action against a municipal corporation for injuries sustained by falling into an excavation dug under municipal authority. 666.

DAMAGES—(continued.)**LAND.**

Flooding land by cutting ditch embankments is not an additional element of damage by a railroad, which has paid for taking the adjoining land, and the "incidental damage to land not taken." 59.

Spreading of a railroad embankment is not contemplated in an original grant of the right of way, and the land owner may recover for injuries sustained thereby. 124.

RELEASE.

False and fraudulent representations by an agent of a railroad company vitiates a release of damages to which they were the inducement. 59.

WHAT ARE EXCESSIVE.

For the loss of both legs by a young boy, \$30,000 is an excessive verdict. 573.

DEBTOR AND CREDITOR.**FAILING DEBTOR.**

Is not permitted to convey, mortgage, nor confess judgment. 371.

But if he contemplate continuance in business, he may do any of these things, so long as he does not thereby prevent himself from actually going on with his business. 371.

All preference among creditors is forbidden in—

Alabama. 372.

Arizona. 373.

Illinois. 373.

Iowa. 374.

Kentucky. 375.

Louisiana. 376.

Maine. 375.

Maryland. 375.

Massachusetts. 376.

New York, to corporations and limited partnerships. 376.

Ohio, to corporations and limited partnerships. 378.

Texas. 379.

Washington. 380.

But in Iowa a partial assignment may be made, unless the intention to make a general assignment exists. 374.

In New York a preference not exceeding one-third of the estate, after deducting wages, salaries, costs and expenses, is allowed to be made by debtors, except corporations and limited partnerships. 377.

In Ohio it is undecided whether an individual debtor, or a partnership, may give preferences. 379.

In Texas a mortgage may be given and payment in property may be made, when the mortgagee and purchaser act in good faith. 380.

In other States preferences in the assignment for the benefit of creditors are forbidden, but the debtor may prefer in other ways. 372.

And in still other States preferences, either by the assignment or otherwise, are allowed. 372.

FRAUDULENT PREFERENCE.

When an insolvent debtor transfers substantially all his property to a part of his creditors, the form of the transfer or transfers will be disregarded, and a statute forbidding preferences in assignments for the benefit of creditors will be held applicable in equity to authorize proceedings for an equal distribution of the assets among all the creditors. 359.

Names of the particular instruments used for such transfers will be disregarded in equity, and the only question considered will be, whether the debtor has, in good faith and without a purpose of discontinuing business, compromised his liabilities by sale or transfer of his property. 359.

But an attempt to obtain an illegal preference will not deprive a creditor of his proportionate share in the estate of the insolvent. 359.

DEBTOR AND CREDITOR—(continued.)**MORTGAGE.**

By insolvent on his entire stock of goods to certain specified creditors, is equivalent to a general assignment. 789.

PART PAYMENT.

Is not a sufficient consideration for the release of a joint maker of a promissory note from all liability thereon. 789.

DESCENT.**ILLEGITIMATE CHILD.**

Born in Pennsylvania and rendered legitimate by the subsequent marriage and cohabitation of its parents in that State, will inherit lands from its father in New Jersey. 730.

DEED. See CORPORATIONS, ESCROW, MARRIED WOMEN.**ALTERATION.**

By grantee, before registration, by substituting his wife's name for his own, renders a deed inoperative. 382.

ANCIENT DEED.

May be challenged on the ground of forgery. 382.

APPURTENANCES.

Includes an irrigating ditch and water-right necessary to the use and enjoyment of the premises conveyed. 124.

When used in deed, term "appurtenances" does not create an easement, where none existed before. 253.

CONTRACT OF SALE.

Conditions in, do not restrict the effect of a subsequent absolute deed for the same land. 313.

DELIVERY.

Necessary to constitute an executed conveyance. 99.

But may be inferred from circumstances. 100.

ESTATE IN ENTIRETY.

Is given by a deed conveying land to husband and wife. 252.

FRAUD.

In an action to cancel a deed on the ground of fraud, "satisfactory proof" only of such fraud is requisite. 505.

RE-EXECUTION.

May be compelled, when an unregistered deed has been wrongfully destroyed by the grantor after delivery, and the grantee cannot waive the tort and recover back the consideration. 505.

REFORMATION.

Will be decreed only when the evidence shows beyond controversy that the mistake was mutual. 445.

RIGHT OF WAY.

Cannot be granted by parol, and, when not of necessity, does not pass by a conveyance of the common owner. 253.

DIVORCE. See MARRIAGE.**DOMICILE.****LUNATIC.**

Alleged lunatic, pending proceeding for the appointment of a guardian, can, if mentally capable, change his domicile to another State. 382.

DONATIO CAUSA MORTIS.**DELIVERY.**

Is essential to validity of, even though the property is already in the possession of the donee. 314, 382.

DOWER.**STATUTE OF WESTMINSTER 2.**

To sustain a plea in bar of dower under the Statute, it is necessary to prove both that the wife deserted her husband willingly and that she was guilty of adultery during the desertion. 730.

DOWER—(continued.)

VALUATION.

Of lands aliened by husband, is to be determined as of the time of valuation, deducting whatever increase may have arisen from the labor and money of the purchaser. 667.

EASEMENT. See DEED.

DITCH.

Must be kept in repair by the owner of the easement, not by the owner of the fee. 505.

ELECTIONS. See EVIDENCE.

BALLOTS.

Erasure of printed name on a ballot and writing opposite another name, requires the vote to be counted for the candidate whose name is written. 252.

RETURNING BOARD.

Rejection of returns by canvassers, whose action binds no one, is immaterial in a subsequent contest. 60.

EMINENT DOMAIN.

MORTGAGEE.

Is bound by the consent of a mortgagor in possession to a railroad's entering upon and constructing its line across the mortgaged premises. 314.

NON-RESIDENT.

Is bound by published notice of proceedings to take his lands for railroad purposes. 505.

EQUITY. See DEED.

INJUNCTION.

To restrain erection of a fence, when granted. 506.

RECONVEYANCE.

Of property transferred to an agent for the purpose of defrauding creditors, will not be decreed. 789.

SPECIFIC PERFORMANCE.

Will not be decreed of an agreement to take care and provide for one in case of "general debility or sickness." 446.

ERROR.

INJUNCTION.

Perpetually forbidding the removal of minerals from certain land and ordering an account of those already taken, is not a final decree and cannot be appealed from. 789.

RIGHT TO APPEAL.

Under a statute limiting such right to cases where the matter in dispute, exclusive of costs, exceeds \$5,000, is not given, where the judgment is for \$5,000 and costs, but not with interest. 446.

TRIAL BY CONSENT.

Before a judge of U. S. Circuit Court at chambers, under an agreement authorizing the judge to either decide the case or submit it to a jury, cannot be reviewed by the Supreme Court. 506.

UNITED STATES.

May appeal from a judgment entered against the Government under the Act of March 3, 1887, irrespective of the amount of such judgment. 667.

ESCROW.

AGENT.

Delivery to, is delivery to the party. 105.

So also, to an officer of a corporation. 105.

CONDITION.

Must be performed by the grantor, not the grantee. 110.

May be either in writing or by parol. 112.

ESCROW—(continued.)**DEFINITION.**

Escrow defined. 103.

DELIVERY.

Will be enforced in equity, when the condition is performed. 108.

In some instances relates back to the first delivery. 109.

As where the grantor dies before the performance of the condition. 110.

GRANTEE.

May act as agent of the grantor to transmit to the holder. 99, 106.

HOLDER IN ESCROW.

Cannot be a party to the instrument. 103.

Conditional delivery to party cannot be made. 104.

Modification of this rule. 104.

PURCHASERS.

Rule as to *bona fide* purchasers. 111.

STATUTE OF FRAUDS.

An escrow is not sufficient to take a deed out of the statute. 112.

SUBJECT OF.

Any instrument, having the essentials of a contract, may be delivered in escrow. 102.

But it must be a completed instrument. 103.

TITLE.

Remains in the grantor until performance of the condition. 108.

Effect of a judgment pending final delivery. 108.

Time of passing is a question of intention. 110.

Does not pass to a grantee wrongfully obtaining possession of the instrument before performance. 110.

When a deed placed in escrow, to await the performance of a condition, is delivered to the grantee before full compliance with such condition, which is subsequently completed, the deed takes effect from the time of such full completion. 505.

WORDS OF DELIVERY.

No special form is necessary to constitute an escrow. 106.

But the grantor must part with all control of the instrument. 106, 107.

And delivery to the grantee must depend upon the performance of some condition, not merely on lapse of time. 107.

Rule different in case of a gift. 107.

Condition may consist in the payment of money. 108.

EVIDENCE. See ATTORNEY-AT-LAW, CRIMINAL LAW, DEED, NEGLIGENCE, RAILROADS, WILLS.**ADMISSIONS.**

By railroad conductor, made after the occurrence of an accident, are not admissible in evidence as part of the *res gestae*. 506.

ATTORNEY-AT-LAW.

Is a competent witness, in an action for his fees, to prove the value of his services. 529.

Also to prove the charges of other attorneys for like services. 529.

In an action by an attorney for his fees, in a certain proceeding, evidence that the attorneys on the other side charged less than the amount claimed by him, and that their services were of as great or greater value, is inadmissible. 529.

CROSS-EXAMINATION.

Court may interfere to prevent unseemly scenes between counsel and a witness, by stopping the course of the examination. 60.

ELECTIONS.

Ballots constitute the best evidence of the choice of the voters, but the burden rests upon the contestant to show that they have been kept intact and are the identical ballots cast at the election. 252.

EVIDENCE—(continued.)**EXPERTS. See MEDICAL EXPERTS.**

Hypothetical questions may assume any state of facts which there is evidence tending to prove. 60.

Definitions of "expert." 487-8-9-90-1.

How far experience is necessary to constitute an expert. 491-2, 498.

How far one who has studied a profession or occupation, but who is without practical experience of the question under examination, may testify as an expert. 493-4.

Decisions holding that profession or occupation, and experience, are both necessary. 494-5.

Rule in case of—

Post mortem examination. 495.

Poison. 496.

Effect of drugs. 497.

Mental condition. 497.

Weight to be given to the testimony of an expert. 498-9.

FAILURE TO CALL WITNESS.

Under a statute providing that evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, comment to the jury upon the failure of a party to introduce his wife to corroborate his own testimony, is proper. 271.

FORMER TESTIMONY.

Under California Code, when it is sought to impeach a witness, by asking him what he said at a former trial, he must first be shown his former statements, if reduced to writing, and have them read to him, if he is not acquainted with the language in which they have been written. 709.

JUDICIAL NOTICE.

General rule as to. 193-4.

Three classes of facts will receive judicial notice: (1) Matters of public law, which all are bound to know. (2) Matters so notorious as to be regarded as universally known. (3) Matters particularly within the cognizance of the particular court. 194.

Judicial notice will be taken of—

National flags and seals. 195.

Foreign judgments. 195-6.

Law of nations. 196.

Law merchant. 197.

Notarial certificates and seals. 197.

Almanacs. 197.

Of certain facts not existing in U. S. by English courts. 197-8.

Existence, tenor and time of taking effect of public statutes. 198.

State laws and judicial decisions, by U. S. Courts. 199.

Charters of municipal corporations. 201.

Acts incorporating banks. 202.

General laws incorporating railroad companies. 203.

Statutes declared by legislature to be public acts. 203.

Journals of legislature. 204-5.

Constitutions and constitutional amendments. 205.

Common law. 205.

Treaties. 206.

Public institutions. 206.

Customs, when so general in character as to be universally known. 321.

Prominent geographical facts and features of the country. 323-6.

In admiralty, the situation of a town upon a river in a foreign country, and the existence of a bar at the mouth of the river. 323-4.

Boundaries of a State, extent of its territorial jurisdiction, and its civil divisions, created by public laws. 324.

EVIDENCE—(continued.)

- Government surveys and legal sub-divisions of the public lands. 325.
- Distance between well-known cities and the ordinary speed of railway trains between the same. 326.
- Public history affecting the whole people. 326-7-8.
- History of the particular State, and its topography and condition. 329.
- Day of holding general election and officers to be elected. 330.
- Accession of persons to, and holding of, offices under the Constitution. 330-1.
- Signatures and certificates of public officers. 332.
- Terms and judges of inferior courts. 449-50.
- Who are justices of the peace within the county where the Court is held. 449.
- Officers of U. S. Courts, by Territorial Courts. 449, 451.
- Requirement in another State of probate and registry. 450.
- Seal of State Court. 450.
- County in which a designated town is located. 450-2.
- Matters of record in the records of the case under consideration. 450-1-2.
- Jurisdiction and seal of certain courts. 451.
- Salary of judge of inferior court. 451.
- Names of counties in the State. 451-2.
- Laws of State, as contradicting allegations in pleadings. 451-2.
- Expirations of charters. 451.
- Signatures of court officers and attorneys on papers executed in the course of their official or professional duties. 452.
- Facts within the judge's official knowledge. 452-3.
- Regular course of nature. 453-4.
- Usual course of agriculture. 453.
- Majority of parties, from the time of their ancestor's death. 453.
- Ebb and flow of tides. 453.
- Ordinary computation of time. 453.
- Ordinary period of gestation. 454.
- Intoxicating properties of certain liquors. 454.
- Navigability of streams. 454.
- What obstruction in the highway will frighten horses of ordinary gentleness. 454.
- Magnetic variation. 454.
- Scientific principles generally known and long in use. 454.
- Processes used in the art of photography. 454.
- Inflammability of coal oil. 454.
- What is a work of necessity on Sunday. 454.
- Authority of railroad superintendent. 455.
- Meaning of current phrases and abbreviations. 455.
- What is a billiard table. 455.
- Nature of lotteries and usual methods of their management. 455.
- Character of circulating medium. 455.
- Changes in course of business. 455.
- Prices of ordinary labor. 455.
- Changes in meaning of words by lapse of time. 456.
- Annuity tables. 456.
- Disturbed condition of business during the war period. 456.
- Character of Free-Masonry. 456.
- Ordinary incidents of railway travel. 456.
- That tobacco and cigars are not drugs and medicines within the meaning of the Sunday law. 573.
- Judicial notice will not be taken of foreign laws. 207, 446.
- Nor of laws of one State by the courts of another. 207.
- Except where a State has been erected from an older one, or from territory formerly belonging to a foreign power. 208.

EVIDENCE—(continued.)

But, where a crime charged would be an offense at common law, it will be presumed, unless the contrary appear, to be against the law of another State. 209.

Nor of customs, local in their character. 322.

Private or special statutes. 322.

Municipal ordinances. 323.

Customs, rules or proceedings of inferior courts of limited jurisdiction. 449.

Record of a case not under consideration. 451.

Instances of the refusal of courts to take judicial notice of certain facts. 457-8-9-60-1-2-3-4-5.

MEDICAL EXPERTS.

Testimony of, held to be, at best, hearsay, and inadmissible in a criminal trial for murder by poison, when the witness has had no practical experience in the treatment of cases of that character, and can testify only from memory of what medical works and instructors teach on the subject. 480.

But the better rule would seem to be that actual experience is not necessary to render a physician competent as an expert on a particular question, but that lack of it should be considered by the jury in determining the weight to be given to his testimony. 499.

A physician cannot be excluded from testifying as an expert on the ground that he is not a specialist in the branch of medical practice under consideration. 498.

PAROL EVIDENCE.

Of circumstances surrounding the parties to a written contract at the time of its execution, where the language used leaves the subject matter in doubt, is admissible for the purpose of ascertaining the true meaning. 446.

PHYSICAL EXAMINATION.

Of one suing for personal injuries, may be compelled by the Court. 506.

PROOF OF DEED.

Certified copy for lands in Ga. is admissible in Ala. only with such proof as would be required by Courts of Ga. 60.

PUBLIC ACTS.

What are. 200, 202-3.

Determined by the extent to which they affect the people, rather than by the territory over which they operate. 201.

Instances of. 201-2-3.

RES GESTÆ.

Declarations made by one injured, immediately after the injury is sustained, are admissible to show how the accident occurred. 148.

SECONDARY EVIDENCE.

May be given of a paper which is in court and is not produced upon demand, though no notice to produce has been given before the trial. 446.

EXEMPTION.**HOMESTEAD RIGHT.**

Will be allowed, as against the husband's debt, entirely out of his interest in premises owned jointly by husband and wife. 124.

INSURANCE.

Upon homestead is not exempt under a law exempting the homestead. 789.

FIRE INSURANCE. See BILLS OF LADING.**ADDITIONAL INSURANCE.**

Consent of agent must be given in the manner prescribed by the policy. 60.

Waiver is a question for the jury. 60.

FIRE INSURANCE—(continued.)

Payment of a second policy, taken out, without the assured's consent, by one wrongfully claiming title, and who was afterwards compelled to account to the assured for the proceeds, is no defense to an action on the original policy. 190, 243.

Where a policy, whose conditions provide that it shall be avoided by additional insurance, not consented to, is issued at the request of a mortgagee, but in the names of two joint mortgagors, one of whom afterwards, without the consent of the insurer, takes out another policy upon his individual interest in the property, no recovery can be had upon the original policy. 216.

But, where the first policy is in the name of the mortgagee, recovery may be had. 216.

Conditions as to other insurance are valid. 221.

Construction of such conditions. 221-2.

Who is the insured. 222-3-4.

What property is insured. 225.

When other insurance exists. 226-7-8-9-30.

Notice of simultaneous policies must be given. 231.

But notice of renewed or substituted policies need not be given. 231.

Where the contract is entire, a forfeiture extends to the whole claim. 232.

Distinction between notice of subsisting and of future insurance 232.

What is sufficient notice. 232-3-4.

What is sufficient consent. 234-5-6-7.

By what circumstances or acts an insurer is estopped from claiming a forfeiture. 237-8.

How the condition may be waived. 239-40-1-2-3.

Tendency of the courts is to liberalize, especially in applying the rules of waiver and estoppel against insurers. 243.

Avoids policy, although the second policy is voidable for the failure to disclose other insurance. 314.

AGENT.

Authorized to procure policies and forward applications, is the agent of the insurer in all that he does in preparing the application, notwithstanding a stipulation in the policy to the contrary. 382.

ARBITRATION.

Condition, making an award of arbitrators, fixing the amount of loss, a condition precedent, is void, as ousting the courts of their legitimate jurisdiction. 253.

ARBITRATION CLAUSE.

When vague, will not be enforced. 667.

ASSIGNMENT.

To purchaser, assented to by the insurer, creates a new contract, which is not affected by a prior default of the assignor. 789.

BY-LAW.

May be waived by an officer of a mutual insurance company. 314.

CERTIFICATE OF MAGISTRATE.

What is compliance with a condition, requiring the production of a certificate of the "nearest" magistrate. 506.

CHANGE OF POSSESSION.

Where a marriage contract gives a wife a life interest in a dwelling and land, in lieu of dower and homestead, her title, upon the death of her husband, is by purchase, not by succession, and a policy, which provides that it shall be void, "in case any change shall take place in title or possession, except by succession" by reason of the death of the assured, is avoided by the husband's death. 314.

CONTRACT TO INSURE.

Breach of, when made with an agent, will support an action for damages against an insurance company, although no premium was paid. 253.

FIRE INSURANCE—(continued.)**INCREASE OF RISK.**

Violation of a condition prohibiting alteration of use so as to increase the risk, renders the policy absolutely void, and does not merely suspend it. 573.

INCUMBRANCE.

Placed upon real estate, without notice, does not affect the insurance upon personal property covered by the same policy. 790.

INCUMBRANCES.

What constitutes waiver of a covenant against. 573.

INSURABLE INTEREST.

Wife cannot maintain action upon a policy taken out upon her separate property in the name of her husband. 253.

Under the Maine statutes a husband has no insurable interest in his wife's property, conveyed by him to her. 446.

Is had by one who has agreed to purchase property and has given promissory notes for the consideration money, upon the payment of which the property is to be conveyed, although such notes are overdue and unpaid. 730.

In mortgaged property, remains in the mortgagor after a decree of foreclosure and until the period for redemption has elapsed, but such interest is ended by a failure to redeem within the specified period.

730.

KEEPING BOOKS.

What is compliance with a condition requiring books to be kept and placed in a safe at night. 507.

LIMITATION.

Where limitation expires on Sunday, suit may be brought the following Monday. 124.

LIVE STOCK.

Killed by lightning, while pasturing, are not covered by a policy insuring a barn and its contents, but excepting loss occurring to property, while removed from such barn. 189.

PREMIUM NOTE.

Part payment of an overdue premium note will not revive a policy which has been rendered void by non-payment. 507.

PROOF OF LOSS.

Notary's certificate of amount of loss is not conclusive upon the assured. 189.

What does not constitute waiver of proof. 573.

PROOFS OF LOSS.

Condition requiring production of certificate of the magistrate or notary public nearest the place of the fire, means the nearest officer of the classes named, whether magistrate or notary. 790.

Waiver of, will not be inferred from mere silence on the part of the insurer, after receipt of notice. 730.

WAIVER. See ADDITIONAL INSURANCE, PROOF OF LOSS.

Of payment of premiums when due, may be constituted by habits of business on the part of the insurer. 253.

WARRANTY.

Breach of, in a policy covering two buildings, which only affects one of such buildings, will not prevent recovery for a loss upon the other. 790.

Of unconditional ownership, is broken by the existence of a mortgage or conditional sale, and a policy issued on the faith of such warranty is avoided by the breach. 507.

WIFE'S POLICY.

Does not inure to the benefit of her children, when her husband survives her, if it contains no provision to that effect. 730.

FIXTURES.**BAKER'S OVEN.**

Is not a trade fixture. 790.

PUMP AND BOILER.

Placed by a railroad upon land erroneously supposed to be its own, and used for pumping water from a well on the same land, are not fixtures, and may be removed, upon discovery of the error. 667.

FRAUD.**FALSE REPRESENTATIONS.**

As to the value of a bond offered for sale, will not sustain an action of deceit, where the purchaser could readily have ascertained its market price. 314.

GAMBLING CONTRACT. See AGENCY.**FUTURES.**

Notes given for losses sustained in carrying "futures" in a cotton speculation, where the purchases were made on margin, are void, and no recovery can be had upon them. 667.

PERSONAL PROPERTY.

What constitutes a gambling contract for sale of. 315.

PROFITS.

Arising from speculative deal in wheat, paid over by one party to a broker, to be paid by him to another, may be recovered by the latter from the broker, though the original contract was not enforceable.

315.

GIFTS.**INTER VIVOS.**

What constitutes a valid gift *inter vivos*. 790.

GUARDIAN AND WARD. See PRINCIPAL AND SURETY.**HOMESTEAD LAWS.****MORTGAGE.**

Upon lands entered under U. S. homestead laws, may be made before final proof or certificate. 574.

HUSBAND AND WIFE. See FIRE INSURANCE, LIFE INSURANCE, MARRIAGE, MARRIED WOMEN, PHYSICIANS, SLANDER, STATUTE OF FRAUDS, TRUSTS.**ARTICLES OF SEPARATION.**

Cannot be assailed, because the contracting parties were husband and wife, in an action between a surviving wife and her husband's executors. 466.

Nor will an executed agreement for a separation be interfered with on the ground of public policy, as this is best subserved by leaving the parties where they have placed themselves. 466.

Where a husband induces his wife to surrender an agreement of separation for a sum of money in hand, the wife cannot afterwards sue for the benefits of the surrendered agreement, without first returning the money received. 466.

Agreements for separation between husband and wife, made while they are living together and to take place presently, are valid. 471.

But not so, when made to take place in the future. 471.

Validity of such agreements is recognized in U. S. 471.

California statute. 471.

But in North Carolina the validity of such contracts is denied. 472-3.

Contracts for separate maintenance, executed with the aid of a trustee, are familiar to the common law and have long been protected and enforced in chancery. 473-4.

Actual and immediate separation is necessary. 474.

Where the separation already exists, the consideration of the husband's agreement is his release from liability for the support of his wife. 475.

HUSBAND AND WIFE—(continued.)

Reunion of the parties is equivalent to rescission. 473.

Subsequent divorce does not release the husband from his covenants. 476-7.

Trustee for the wife is essential, unless there is some statutory exception. 477.

Exceptions. 478-9.

Iowa statute. 478.

Wife may rescind by accepting other provisions. 479.

Wife must sign deed or articles, and cannot act by attorney. 480.

Otherwise in Vermont. 480.

COMMON LAW RULE.

That civil existence of wife is merged in that of her husband still obtains, save where an exception has been legally established. 410.

CONTRACT TO SUPPORT HUSBAND.

Made by wife, is void. 790.

GIFT.

By wife to husband, makes the money given the property of the latter, and it does not constitute such a valuable consideration as will support a subsequent conveyance from the husband to the wife. 253.

LOTTERY PRIZE.

Received from ticket purchased with the separate money of the wife, is community property under the Texas statute. 315.

MARRIAGE CONTRACT.

Stipulating that furniture, etc., in use "for family purposes," shall, upon the death of either, vest in the survivor, does not include heirlooms. 190.

PENSION MONEY.

Received by husband from U. S. may be given by him to his wife for the purchase of a home in her name, and the property so purchased will not be liable to the claims of the husband's creditors. 446.

POWER OF ATTORNEY.

May be given by wife to husband to convey her inchoate interest in his estate. 507.

PRESUMPTION OF DEATH.

Arising from absence of husband for seven years, may be rebutted, and a second marriage made upon the strength of such presumption, is void, if the husband was in fact alive. 446.

SERVICES.

Claim against an administrator cannot be sustained by a woman who married and lived with decedent, supposing him to be unmarried, but afterwards learned that he had a wife living. 60.

STATUTES.

Statutes have been adopted, and decisions rendered, affecting the right of a wife to bring suit directly against her husband, in the following States and Territories:

Alabama. 754.

Arkansas. 754.

Arizona. 754.

California. 754.

Colorado. 755.

Connecticut. 756.

Dakota. 757.

Delaware. 757.

Florida. 757.

Georgia. 757.

Idaho. 758.

Illinois. 758.

Indiana. 759.

Iowa. 760.

HUSBAND AND WIFE—(continued.)

Kansas. 761.
 Kentucky. 761.
 Louisiana. 761.
 Maine. 762-3.
 Maryland. 763.
 Massachusetts. 764.
 Michigan. 764-5.
 Minnesota. 766.
 Mississippi. 766.
 Missouri. 766.
 Montana. 767.
 Nebraska. 768.
 Nevada. 768.
 New Hampshire. 768-9.
 New Jersey. 770.
 New Mexico. 771.
 New York. 772.
 North Carolina. 774.
 Ohio. 775.
 Oregon. 775.
 Pennsylvania. 748, 776-7-8.
 Rhode Island. 779.
 South Carolina. 779.
 Texas. 779-8a.
 Utah. 78a.
 Vermont. 781.
 Virginia. 781.
 Washington. 782.
 West Virginia. 782.
 Wisconsin. 783.
 Wyoming. 784.

SUIT BY WIFE AGAINST HUSBAND.

In Pennsylvania, a wife may not sue her husband directly, and in her own name, for money received by him from her separate estate. 748.
 But she may do so in England, under the Married Women's Property Act. 753.

WIFE'S RIGHTS OF ACTION.

Conferred in Pennsylvania by the Married Person's Property Act of 1887, are those only which are necessarily incident to her rights of ownership of property and capacity to contract as if she were a *feme sole*. 748.

INFANTS.**CONTRIBUTORY NEGLIGENCE.**

Of a child seven years of age, is a question for the jury. 547.
 The court will decide that a child of very tender years has not sufficient judgment to be guilty of contributory negligence, but it is impossible to prescribe a fixed period when a child attains to such judgment. 547.

ILLEGITIMATE CHILD.

Testamentary guardian for, cannot be appointed by its father. 790.

RIGHT TO PLAY IN STREET.

Is not settled. 550.

But it is nowhere disputed that children *sui juris*, or children *non sui juris*, in charge of a proper person, have the same right as adults on the sidewalk and streets. 550.

There is a distinction in this regard between children *sui juris* and those *non sui juris*, as to the application of the doctrines of imputable and contributory negligence. 550.

The correct proposition is that all children, whether *sui juris* or *non*

INFANTS—(continued.)

sui juris, have the right to play on the sidewalk and street, and if injury to them can be avoided by the exercise of due care, such care must be used, and the want of such care is not excused by imputable or contributory negligence on their part. 550-1, 557.

Doctrine of *Hartfield v. Roper* (1839), 21 Wend. (N. Y.) 615, criticised. 551.

Hartfield v. Roper is sustained by the courts of nine States. 551-2.

And repudiated by those of ten. 552.

Limitations of the doctrine of *Hartfield v. Roper*. 552-3.

INSOLVENCY.**DISCHARGE.**

By State insolvent court, does not affect a creditor, who is a citizen of another State, and was not a party to the proceeding. 253.

INTERSTATE COMMERCE LAW.**CAR.**

Carrier must furnish a car properly adapted to carry the quantity designated. 61.

DESTINATION.

Regulation intended in the first and second sections of the Act is from the origin to the destination of the cargo; "to" means the destination at any place within the State or foreign country, reached by a continuous carriage or shipment. 315.

JURISDICTION.

Of Federal Courts over actions for the violation of the Interstate Commerce Act is not dependent upon diverse citizenship. 124.

Of Commission extends to commerce between points in the same State, passing in transit through another State. 124.

PASS.

Proof of the issuing of an unused and expired pass does not establish discrimination in fares. 124.

RATES.

Reasonableness of, must be determined by the circumstances of the carrier, as well as the exigencies of the shipper's business. 61.

If just and reasonable from selected points through certain territory, are *prima facie* just and reasonable from all other points therein. 125.

TRAFFIC.

Interchange of, cannot be denied by one railroad to another, on the ground that the latter supplies no public necessity. 61.

JUDGMENT.**LUNATIC.**

Validity of judgment against lunatic cannot be questioned in a collateral proceeding. 315.

TORT.

Assignment of right of action in tort cannot be made before judgment is actually entered. 61.

JURISDICTION. See CONSTITUTIONAL LAW, CRIMINAL JURISDICTION, CRIMINAL LAW, INTERSTATE COMMERCE LAW.**DIVERSE CITIZENSHIP.**

Federal Courts may entertain, where parties are of diverse citizenship, a bill in equity to vacate, on the ground of fraud, an order of sale made by a State Probate Court. 125.

When the Federal Courts have once acquired jurisdiction by reason of diverse citizenship, such jurisdiction is not lost by a transfer of the cause or action, whereby the controversy becomes one between citizens of the same State. 507.

EMBEZZLEMENT BY OFFICER OF NATIONAL BANK.

Is within the exclusive jurisdiction of the Federal Courts. 507.

FEDERAL COURTS. See HABEAS CORPUS.

Have jurisdiction to inquire into the circumstances of a homicide

JURISDICTION—(continued.)

committed by an officer of the United States, in order to determine whether the act was committed in the line of duty, or was malicious, wanton, reckless, or without reasonable apparent necessity. 585.

Originally had jurisdiction to entertain a suit against a State by a citizen of another State. 625.

But this was taken away by the Eleventh Amendment to the Constitution. 625.

Have no criminal jurisdiction in common law cases. 628.

May be given jurisdiction by Congress in suits by a U. S. Bank. 633-4.

HABEAS CORPUS.

Upon a writ of *habeas corpus*, the Federal Courts have jurisdiction to discharge a petitioner, when found to be in custody for an act done, or omitted, in pursuance of a law of the United States, no matter from whom, or under what authority, the process may have issued under which he is held. 585.

By the Judiciary Act of 1789, since incorporated in the Revised Statutes, Federal Courts were given *habeas corpus* jurisdiction. 624.

Which has been sustained by judicial decisions. 633.

By the Force Bill of 1833, afterwards incorporated in the Revised Statutes, the *habeas corpus* jurisdiction was extended, and penalties prescribed for disobedience to such writs. 635.

This jurisdiction was further extended by the Act of 1842, also incorporated in the Revised Statutes. 635-6.

Decisions, since the Force Bill of 1833 and the Act of 1842, upon the *habeas corpus* jurisdiction of the Federal Courts, cited and discussed. 636-653.

PENALTY.

Action for penalty imposed by a State statute upon railroad companies guilty of extortion, cannot be removed to the Federal Courts. 315.

PERJURY.

Committed in a contest for a seat in the U. S. House of Representatives, is within the exclusive jurisdiction of the Federal Courts. 507.

STATE COURTS.

Forgery of note, to deceive the U. S. bank examiner, may be tried in a State Court. 61.

Penalty for usury received by a National Bank may be recovered in a State Court. 61.

May enjoin the removal of appurtenances to a wharf on navigable waters. 125.

Have exclusive jurisdiction over an action between citizens of the same State on a contract to pay royalties upon a patented invention. 125.

Have no jurisdiction to enjoin a citizen of one State from prosecuting a suit in the courts of another State, on the ground that the latter courts differ in their views of the law governing the case from the U. S. Supreme Court. 382.

STATE LEGISLATURE.

May authorize the building of a bridge, which obstructs a navigable river altogether within the State's own borders, provided Congress does not interfere. 125.

U. S. JUDGES.

An assault upon, or an assassination of, a Judge of a Federal Court, while traveling for the purpose of holding Court, is within the jurisdiction and power of the U. S. Marshal, or his deputies, to prevent, as peace officers of the Government of the United States. 586.

U. S. SUPREME COURT.

May compel a State Court to obey its mandate. 628.

Has jurisdiction over a case arising under the Constitution or laws of

JURISDICTION—(continued.)

the United States, notwithstanding the fact that a State may be a party thereto. 630-1-2.

LANDLORD AND TENANT.**ASSIGNMENT OF TERM.**

A transfer by a tenant, of demised premises, for the unexpired residue of his term, is an assignment, making the assignee liable to the original lessor for rent, though the instrument of transfer purports to be a lease, reserves a different rent from that specified in the original lease, with right of re-entry and forfeiture for nonpayment, and provides for surrender of the premises to the original lessee. 558.

And the refusal of the original lessor to release his lessee from liability for rent, does not estop him from treating the sub-lease as an assignment. 558.

Nor does the fact that the transfer was made without the consent of the original lessor, in violation of the provisions of the lease, affect his right to recover rent from the transferee. 558.

DEATH OF LESSOR.

Is not an alienation. 190.

DEFECTIVE BUILDING.

Risk is taken by tenant, when the defects are apparent and there is neither express warranty, fraud, nor misrepresentation. 125.

DISTINCTION BETWEEN ASSIGNMENT AND SUB-LEASE.

Is a fundamental one, based upon principles of the feudal law, and is wholly independent of the form of conveyance. 566.

Difference between alienation and sub-infeudation is the basis of the distinction between an assignment and a sub-letting. 567.

In determining the question whether a particular conveyance is an assignment or a sub-lease, the test is, whether the original lessee retains a reversion. 567.

Authorities considered. 567-8-9.

Differing qualities of an assignment and a sub-lease. 568-9.

FAILURE TO GIVE POSSESSION.

What damages may be recovered by the tenant. 791.

LEASEHOLD ESTATE.

For 99 years, is personalty. 190.

WORKING THE QUARRY.

In lease, includes the removal of water which has flooded the quarry. 791.

LAND PATENTS. See LIMITATION.**PLACER CLAIM.**

Covers all mineral deposits found therein. 508.

STONE QUARRY.

May be patented as a placer claim. 508.

LIABILITY FOR CAUSING DEATH.**ACTION.**

To recover damages for causing death, is not maintainable at common law. 385.

Nor in admiralty. 385.

But only when authorized by statute. 385.

LIMITATION.

The statute of limitations does not begin to run until the appointment of an administrator. 578.

But, where death was not instantaneous, it has been held that the running of the statute began at the time of the injury. 579.

STATUTORY LIABILITY.

Under Lord Campbell's Act (English), the jury should not be allowed to take into consideration mental sufferings or bereavements, but must give compensation for pecuniary loss only. 385-6.

LIABILITY FOR CAUSING DEATH—(continued.)

Some actual damage must be shown; the recovery of nominal damages is not permissible. 386.

Damages may be recovered on account of a change in the mode of distribution of property among members of a family, although no pecuniary loss to the family in the aggregate could ensue. 386.

Settlement made by a decedent in his life-time, bars an action under the statute after his death. 387.

But recovery by a widow as administratrix for personal property of the decedent, damaged by the same cause which resulted in his death, does not bar the widow's right of action under the statute. 388.

Nor does the statute prevent recovery by an administrator for pecuniary loss or damage resulting to a decedent from personal injury. 389-90-1.

Under American statutes, the damages recovered are exclusive of any loss or damage to the injured party during his life and include only the loss caused by his death to the persons specified. 391-2-3-4.

Statutes of Massachusetts and Maine. 395.

In Kentucky, recovery cannot be had under the statutes when death is practically instantaneous, but otherwise, when an appreciable interval of suffering elapses between the infliction of the injury and the death. 513-4.

In New York and Texas an action is maintainable in case of instant death. 514.

So also under the statutes of Connecticut, Tennessee and Iowa. 514.

But not so in New Jersey. 516.

The statute gives a new cause of action, not a continuance of one existing at common law, and hence has no extra-territorial operation. 516-7.

But where the death is caused in one State and suit is brought in another, the suit is maintainable, if both States have statutes giving a right of action, and substantially alike. 518.

The Supreme Court of U. S. has, however, recognized the right to recover in one State, under the statutes of another State, within which the death was caused. 519.

Rule as to right of action for a death occurring at sea. 519.

Settlement made by the injured person in his lifetime bars a suit under the statute after his death. 520-1.

In Kentucky, a suit by an administrator to recover damages for the sufferings of the intestate prior to his death, is a bar to a subsequent action based upon the death itself. 522.

In Illinois, it is held that the statutory right of action is a continuance of the common law right belonging to the decedent, and, therefore, two recoveries cannot be had. 523.

So also in Kansas. 524.

Otherwise in U. S. Court for Kansas, and in Mississippi. 524-5.

Rule in Maine. 525.

" Massachusetts. 526-7.

" Pennsylvania. 527.

" Vermont. 526.

Recovery of father for loss of services of a minor son does not bar an action by the father, as administrator, to recover damages for the son's death. 527.

Summary of decisions. 528.

In Wisconsin the statutory action abates on the death of the beneficiary. 577.

So also in Missouri. 577.

But otherwise in Connecticut and New York. 577.

In New York and Indiana, an action begun in the life-time of the person injured may be continued after his death. 578.

The right of action given by the statute should be regarded as a new

LIABILITY FOR CAUSING DEATH—(continued.)

right of action, and not a revival or continuation of a common law right possessed by the deceased. 580-1.

New York Statute. 582.

Pennsylvania " 582.

Lord Campbell's Act. 584-5.

LIBEL. See COMMERCIAL AGENCIES, SLANDER.**COURT RECORDS.**

Pleadings filed in Court, which are pertinent and material, are privileged. 61.

Publication of pleadings or other proceedings in civil causes, before trial, is not privileged. 253.

RAILROAD COMPANY.

Poster, put up in the ticket office of a railroad company by the ticket agent, and left there for forty days, is a publication by the company. 316.

List of discharged employes, giving reasons for discharge, and placed in the hands of persons whose duty it is to employ servants for the company, is privileged. 574.

LIFE INSURANCE. See ACCIDENT INSURANCE.**ASSESSMENTS.**

Where there has been unreasonable delay in making an assessment to meet a loss, a beneficiary is entitled to recover the maximum amount named in the certificate. 126.

When notice of assessments is always sent by mail, although the charter provides only for posting, a failure to mail such a notice estops the insurer from claiming a forfeiture for non-payment. 253.

ASSIGNMENT.

Power to assign or surrender policies for the benefit of wife and children considered. 434-5, 437-8-9-40-1-2-3.

BY-LAW.

Which conflicts with the terms of the policy, will be construed to be waived. 62.

CONSTITUTIONAL EXEMPTION.

Of life insurance from the claims of the insured's creditors, is given in North Carolina. 433.

But the provision does not apply to assignments of policies. 433.

Decisions. 439.

CREDITOR'S POLICY.

What amount of proceeds may be retained by the creditor. 316.

DIVISION OF FUND.

Conflicting rules as to the division of proceeds of life insurance, where creditors are permitted to come in. 443.

DRUNKENNESS.

Payment of loss cannot be refused on the ground of intemperate habits of the insured, when the latter was known to the agent insuring him to be a confirmed drunkard. 62.

ENDOWMENT POLICY.

Cannot be lawfully issued by a mutual benefit company incorporated to give aid "to the widows, orphans, and heirs or devisees of deceased members." 791.

INSOLVENT DEBTOR. See STATUTE.

May insure his life for the benefit of his wife and children, without rendering the proceeds liable to the claims of creditors. 417, 435-6, 442.

Nor is the payment of premiums for such insurance equivalent to a transfer of property with intent to hinder, delay and defraud creditors, such as would be void under the Statute of Elizabeth. 417.

Unless there is evidence of a fraudulent intent, participated in by the beneficiary and insurer. 417.

LIFE INSURANCE—(continued.)

But it has been held otherwise, in the absence of statutory provision. 432-3.

And assignments of policies originally issued in the debtor's own favor, have also been declared fraudulent. 432-3.

A distinction is made between assignments of policies and policies issued directly to the beneficiary. 432.

But the tendency is in the direction of the exemption of such policies from liability for the insured's debts. 442.

PAID-UP POLICY.

Issued in pursuance of an agreement in a prior policy, without new consideration, is not a new contract, and is not affected by a change in the constitution of the company, made after the date of the first policy. 254.

STATUTES.

Exempting the proceeds of life insurance from the claims of creditors, have been adopted in—

Great Britain. 432.

Alabama, and decisions. 433.

Arkansas. 433.

California, and decisions. 433.

Connecticut. " " 419, 434.

Delaware. 434.

Florida, and decisions. 434.

Georgia, " " 434.

Illinois, " " 435.

Indiana, " " 435.

Iowa. 436.

Kansas. 436.

Kentucky, and decisions. 436.

Maine, " " 436.

Maryland, " " 437.

Massachusetts, " " 437.

Michigan. 437.

Minnesota, and decisions. 437.

Mississippi. 438.

Missouri, and decisions. 438.

New Hampshire, and decisions. 438.

New Jersey, " " 439.

New York, " " 439.

Ohio, " " 440.

Pennsylvania, " " 440.

Rhode Island, " " 441.

Tennessee, " " 441.

Vermont. 442.

Virginia, and decisions. 442.

Wisconsin, " " 442.

There is no statutory provision in—

Colorado. 434.

Louisiana (decisions). 436.

Nebraska. 438.

Nevada. 438.

Oregon. 440.

South Carolina. 441.

Texas (decisions). 441.

West Virginia. 442.

WAIVER. See BY-LAW.

Knowledge by assistant superintendent that a policy-holder is engaged in the liquor business, is a waiver of a forfeiture for carrying on such business. 190.

LIFE INSURANCE—(continued.)

Refusal to furnish blanks for proof of death, on the ground that the policy was forfeited, is a waiver of such proof. 190.

WIFE'S POLICY. See **INSOLVENT DEBTOR.**

Policy payable to wife and children. exchanged after the wife's death, for a prior policy payable the same way, is not liable for the debts of the insured. 383.

Payable to "heirs, administrators or assigns," upon the insured surviving his wife, inures to the benefit of his heirs, and not hers. 791.

LIMITATION. See **ADMIRALTY, ATTORNEY-AT-LAW, BILLS OF LADING, FIRE INSURANCE, TELEGRAPHS.**

ACKNOWLEDGMENT.

Letter, alluding to "those old notes," and promising "every cent that is due on them," does not remove the bar of the statute. 62.

Indorsement on note, acknowledging "indebtedness of this note," removes the bar of the statute. 62.

BAILEE.

Statute runs against, from the denial of the bailment and conversion of the property. 62.

FEDERAL COURTS.

Will enforce State statutes of limitation, in the absence of Congressional legislation. 667.

JOINT NOTE.

Payments by one joint maker will arrest the running of the statute as to all. 191.

LAND.

Inclosure is not necessary to constitute adverse possession. 126.

LAND PATENT.

Government suit to revoke for fraud and misrepresentation, may be barred by the statute or laches. 62.

MONEYS RECEIVED FOR INVESTMENT.

Are subject to the bar of the statute. 508.

RES ADJUDICATA.

When introduced in a pending action by supplemental bill, is not a new cause of action, and the statute does not apply. 126.

STOCK SUBSCRIPTIONS.

Are not subject to the running of the statute, until called for, and after an assignment for the benefit of creditors, until the court makes a call. 383.

WAR PERIOD.

In Alabama, is to be deducted from a calculation of the statutory bar. but not from the time necessary to raise a presumption of payment. 191.

LIQUOR LAWS. See **CONSTITUTIONAL LAW.**

CIDER.

Whether cider is a vinous or spirituous liquor, within the prohibition of a license law, is a question of fact, to be determined by a jury, and not by the court. 254.

Prohibition of sale of, without any qualifying adjective, applies to all cider, without regard to its intoxicating quality. 731.

CHIPS.

Sale of, to be exchanged for liquor, is equivalent to a sale of the liquor itself. 508.

CHURCH.

Prohibition of sale within three miles of a church does not apply to a contract for the sale and delivery of liquor, which is actually outside that limit. 126.

CORPORATION.

Where a corporation sells intoxicating liquor illegally, its officers and servants may be convicted and punished for the violation of law. 508.

LIQUOR LAWS—(continued.)**DRUGGIST.**

Sale of intoxicating liquors by, when forbidden by statute, is not excused by the fact that they were sold in good faith as a medicine, without knowledge of their intoxicating qualities. 731.

GIFT OF LIQUOR.

Damages cannot be recovered for injuries occasioned by intoxication, under a statute giving a right of action against "any person who shall, by selling or giving intoxicating liquors, have caused the intoxication," from one who gives liquor to a friend, as a mere act of courtesy, without any purpose of pecuniary gain. 316.

ILLEGAL SALE.

Conviction may be had both for selling without a license and for selling to a minor, although both indictments are based upon the same sale. 254.

LOCAL OPTION LAW.

Validity of election adopting, cannot be questioned in a prosecution for its violation. 191.

MINOR.

Selling to, on order of and for delivery to his father, is not a violation of a statute prohibiting the sale or gift of intoxicants to minors. 508.

SALE "C. O. D."

Of liquor, consigned by a common carrier, is consummated at the time and place of shipment. 791.

SELLING FROM WAGON ON HIGHWAY.

Does not violate a statute prohibiting the unlicensed sale of liquor, to be drank in the seller's "house, out-house, yard, garden, or the appurtenances." 191.

SERVANT.

Who, in the absence of the proprietor, makes sales and assumes control of a saloon, may be convicted of keeping such saloon. 191.

TAXATION.

Under Michigan statute, a foreign manufacturer, who sells at wholesale within that State, is taxable as a wholesale dealer. 574.

MARINE INSURANCE.**ABANDONMENT.**

When accepted. 254.

INSURABLE INTEREST.

Part owner of a vessel has an insurable interest for advances and disbursements made by him upon a venture engaged in with such vessel by himself and the other owners. 254.

RESCUE.

General average expenses for rescuing a vessel from a peril brought about by negligence in her navigation, cannot be recovered under a policy, which excepts losses from negligent navigation. 316.

SUBROGATION.

Inures to insurance company, when the goods insured have been lost at sea through the negligence of a carrier, and the insurance has been paid to the shipper. 447.

SUNKEN CARGO.

Abandoned to underwriters, may be sold by them to a third person. 574.

UNSEAWORTHINESS.

Will be presumed when a canal boat, which is old and subject to heavy strains, suddenly springs a leak and sinks in fair weather and smooth water. 574.

MARRIAGE.**INDIANS.**

Solemnization according to the customs of an Indian tribe need not take place within the territory of such tribe, to constitute a valid marriage. 316.

MARRIAGE—(continued.)**RE-MARRIAGE AFTER DIVORCE.**

Prohibition of, renders such marriage void in the State of the domicile, even when contracted in another State where no such prohibition exists. 254.

MARRIED WOMEN. See HUSBAND AND WIFE.**ACQUIESCENCE.**

By a married woman in a deed made during her minority, will not, so long as she is covert, amount to ratification, but, to annul such deed, she must pay the grantee for necessities supplied her while a minor, and which constituted part of its consideration. 508.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

In Wisconsin, cannot be made to a married woman. 790.

BLANK DEED.

A married woman is estopped from disputing the validity of a deed, regularly executed and acknowledged, and subsequently delivered by her husband to an innocent purchaser, notwithstanding the facts that at the time of its execution and acknowledgment, there was a blank in the deed for the name of the grantee, and that the wife was misled as to what property the deed conveyed. 654.

But it is questionable whether the doctrine of estoppel is thus properly applied. 657.

The proper question to be considered is whether a married woman has the capacity, under the enabling statutes, to execute and acknowledge a deed in blank. 658.

The U. S. Supreme Court holds that she has no such capacity. 658.

And it has been so held in Iowa and Massachusetts. 659.

Decisions cited and discussed. 660-4.

CONDUCT IN PAIS.

May operate as an estoppel, notwithstanding coverture and the absence of fraud. 126.

JUS DISPONENDI.

At common law, in equity and under the statute, the rule is that a married woman has no power to dispose of her estate, except by compliance with the requirements of the instrument creating the power. 659.

Where a statutory power is conferred, she has no capacity but that expressly given in the statute, whose requirements must be strictly complied with. 662.

MASTER AND SERVANT. See LIQUOR LAWS, NEGLIGENCE, RAILROADS, SUNDAY LAWS.**DEFECTIVE APPLIANCES.**

Railroad company is responsible for an injury to an employe, resulting from defective car brakes. 62.

But not for an injury to an engineer, by reason of the defective track of another company, upon which he was temporarily running his employer's engine. 64.

DISCHARGE.

What conduct of the servant will warrant his discharge before the expiration of the term of his employment. 508.

Of employe, without sufficient excuse, before the expiration of the term of his employment, entitles him *prima facie* to the stipulated compensation for the entire term, and the burden is upon the employer to show what he could have earned elsewhere. 731.

FELLOW-SERVANT.

What is. 191.

Foreman of bridge gang upon a railroad is a fellow-servant with employes operating a train on the road. 316.

Overseer of slashing-room in a cotton mill is a fellow-servant with the second foreman of the machine-shop department. 317.

MASTER AND SERVANT—(continued.)**RAILROAD COMPANY.**

Is not liable for an injury to an employe by reason of a danger which might have been observed and avoided. 64.

But is liable for an injury to a brakeman, sustained at night from an overhead bridge, whose proximity he could not know. 64.

VICE-PRINCIPAL.

What constitutes. 791.

Negligence of, is not negligence of fellow employe, and the employer is liable therefor. 127.

MECHANICS' LIENS.**RAILROAD COMPANY.**

Cannot claim exemption from liens for erecting its bridges, on grounds of public policy. 447.

MINES AND MINING. See LANDLORD AND TENANT.**MINING GROUND.**

As used in a statute, includes a ditch and water-right, by means of which a mine is operated. 791.

MORTGAGE. See HOMESTEAD LAWS.**AGREEMENT TO RECONVEY.**

When such agreement does not constitute a mortgage. 126.

PROCEEDS OF SALE.

In foreclosure proceedings, under a mortgage given to secure two notes of the mortgagor, with different sureties, should be applied to the payment of both notes *pro rata*. 383.

MUNICIPAL CORPORATIONS.**BURNT BUILDINGS.**

Falling of walls of, does not render a municipality liable for the damages sustained. 317.

GARNISHMENT.

City cannot be garnisheed and made liable to pay a creditor of its creditor, without express statutory provision. 281.

Exemption is based entirely upon grounds of public policy. 281, 290. Statutes of Kansas, relating to garnishment and cities of the second class, do not authorize the attachment of moneys owing by such cities. 281.

NEGLIGENCE. See CANALS, RAILROADS, INFANTS, MASTER AND SERVANT, SUNDAY LAWS, TELEGRAPHS.**AGRICULTURAL SOCIETY.**

Is liable to one injured by reason of negligently constructed seats on its fairground. 63.

BARB-WIRE FENCE.

If negligently constructed, will render the owner liable for injuries occasioned thereby to the domestic animals of others, although it is entirely on his own land. 667.

BLIND PERSON.

It is not negligence *per se* for a blind person to walk unattended in the street, and such person is bound to use ordinary care only. 317.

CONCURRENT NEGLIGENCE.

Of carrier and third person, by which a passenger of the former is injured, does not relieve the latter from liability. 509.

CONTRIBUTORY.

Boy of ten and a-half years may be chargeable with. 63.

Is a question for jury, where one is injured after dark by a defect in street. 63.

Ordinary care only is required of one injured by a machine operated by another. 63.

Of driver, will not be imputed to one who rides by invitation in a vehicle, exercising no control over its movements. 127.

NEGLIGENCE—(continued.)

Of parents, cannot be imputed to a child of tender years, even in an action where the parents are indirect beneficiaries. 792.

Is chargeable to one falling into a hole in the sidewalk, which could have been plainly seen. 191.

ELEVATOR.

Absence of railing and trap-door, required by statute, is *prima facie* evidence of negligence on the part of the owner. 574.

Furnished by a storekeeper for the convenience of his customers, must be of good material and safe. 792.

EVIDENCE.

In an action to recover for injuries sustained through reckless driving, proof is admissible of the amount of travel on the street where the accident occurred. 189.

OBSTRUCTION TO TRAVEL.

When placed in street by order of the judge of a State Court, does not render the municipality liable for damages occasioned thereby. 191.

PRIVATE BRIDGE.

Need not be kept in repair by the owner, although used by the public without his invitation or any benefit accruing to him. 792.

PUBLIC NUISANCE.

Permitted by a municipality, renders it liable for damages sustained by reason thereof. 792.

REGISTERED LETTER.

Delivered by a letter-carrier to a hotel clerk, and lost through the negligence of the latter, renders him liable to the carrier for money contained in the letter, which the carrier has been compelled to refund. 792.

REMAINDERMEN.

Are not liable for defects in a wharf property, existing before it comes into their possession, subject to an outstanding lease, unless expressly notified thereof. 792.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES, BILLS OF LADING, CHECKS.**BOTTOMRY BILLS.**

Are not negotiable in U. S. 317.

COLLATERAL NOTE.

Is not negotiable. 254.

REGISTERED VIRGINIA COUPON CONSOLS.

Are not negotiable, without indorsement. 731.

RENEWABLE NOTE.

Promissory note, renewable at the option of the payee or holder, is not negotiable. 792.

STOCK CERTIFICATE.

Is not negotiable, any usage among stockbrokers to the contrary notwithstanding. 255.

WARRANT.

Order for payment of school funds is not negotiable. 254.

NOTARY PUBLIC.**SURETY.**

Under what circumstances the surety on the official bond of a notary public will be liable for a false certificate of acknowledgment. 447.

NUISANCE.**CEMETERY.**

Location near residences will be enjoined. 127.

CULTIVATION OF LAND.

Usual and reasonable cultivation of land will not constitute a nuisance, although the soil is drained into a mill-pond by reason of such use. 575.

NUISANCE—(continued.)**PUBLIC.**

Public nuisance will not be enjoined at the suit of an individual, unless the latter suffer some private, direct and material damage. 317.

PARENT AND CHILD.**TORTS.**

Father is responsible in damages for the torts of his children, committed with his countenance and encouragement. 317.

PARTNERSHIP.**GOOD-WILL.**

Of the insurance agency business of a dissolved firm does not belong to either partner exclusively. 509.

SEALED INSTRUMENT.

Executed in the firm name by one partner only, does not bind the firm. 383.

SPECIAL PARTNERSHIP.

Is not changed into a general partnership by a failure to comply with the statutory requirements, which renders the special partner liable to creditors as a general partner. 668.

PATENTS.**CITIZENSHIP.**

False oath that the applicant is a citizen of U. S., made innocently and without fraudulent intent, will not affect the validity of a patent. 318.

FRAUD.

Bill to cancel patent obtained through fraud may be maintained by U. S.. 127.

GAMBLING DEVICE.

Cannot be patented. 793.

INFRINGEMENT.

Of invention, before patent is issued, will not be enjoined. 318.

LAPSED ENGLISH PATENT.

Will prevent the issuance of an American patent for the same invention. 793.

PROMISSORY NOTE.

Given in U. S. for an English patent, is subject to the English rule that a promise to pay for a void patent is not without consideration. 318.

PHYSICIANS. See PRIVILEGED COMMUNICATIONS.**OPERATION.**

Surgical operation upon a married woman may be performed without her husband's consent. 255.

PLEADING.**DAMAGES.**

In an action by an administrator for causing the death of decedent, brought on behalf of the widow and children, a general averment of damages is sufficient. 148.

PRACTICE.**IMPERFECT PLEADINGS.**

Are cured by verdict. 668.

SPECIAL VERDICT.

If silent concerning any of the issues in the case, it will be presumed that the party having the burden of proof, failed to prove them. 148.

VENIRE DE NOVO.

Will not be granted, where a special verdict does not contain an affirmative or express finding upon some of the issues. 148.

VERDICT.

Affidavits of jurors will not be received to impeach their verdict. 576.

PRINCIPAL AND SURETY.

GUARDIAN.

Release by ward and discharge by court, both fraudulently obtained by guardian, do not operate to relieve his surety from liability. 127.

PUBLIC OFFICERS.

Sureties for clerk of court are not relieved from liability by the failure of the board of supervisors to audit the clerk's accounts, as required by law. 127.

PRIVILEGE.

SERVICE OF PROCESS.

Cannot be made upon a party to an injunction suit, while attending the hearing. 63.

Nor upon a non-resident who has come from another State for the sole purpose of attending and testifying in a case to which he is a party. 318.

PRIVILEGED COMMUNICATIONS.

ATTORNEYS-AT-LAW.

Communications by a client to his attorney, counsellor or solicitor, for the purpose of obtaining professional advice or assistance, are protected from disclosure. 1.

Privilege extends to clerks and assistants of attorney; also to necessary interpreter. 4.

Exceptions to rule. 4, 5, 6.

Rule covers all methods of communication. 6.

Waiver of privilege may be made by client. 7.

Confidential communications made in order to obtain advice to aid in the commission of crime, are not protected. 8.

CLERGYMEN.

Confessions to clergymen are not privileged at common law. 15.

Many States have protected such confessions by statute. 15.

Privilege depends upon the confession having been made to the clergyman in his professional capacity. 15.

PHYSICIANS.

Communications by a patient to his physician are not privileged at common law. 9.

Many States have protected such communications by statute. 9.

Privilege extends to all information acquired by the physician in his professional capacity, whether from the patient, from others, or from his own observation. 9.

Information not necessary to enable physician to act professionally, is not protected. 11.

Nor information obtained from one who seeks advice to aid in the commission of crime. 11, 12, 14.

Waiver of privilege may be made by patient. 12.

But not by his representatives, after his death. 13.

Privilege extends to the physician's assistants. 14.

STATUTES.

Arizona. 16.

Arkansas. 16, 17.

California. 17.

Colorado. 17.

Dakota. 17.

Georgia. 17.

Idaho. 18.

Indiana. 18.

Iowa. 18.

Kansas. 18.

Michigan. 18, 19.

Minnesota. 19.

Missouri. 19.

PRIVILEGED COMMUNICATIONS—(continued.)

Montana. 19.
 Nebraska. 19.
 Nevada. 19, 20.
 New York. 20.
 Ohio. 20.
 Oregon. 20.
 Pennsylvania. 20.
 Tennessee. 21.
 Texas. 21.
 Utah. 21.
 Washington. 21.
 Wisconsin. 21.
 Wyoming. 21.

PROCESS. See PRIVILEGE.**SERVICE ON HOLIDAY.**

Is not invalid in New Jersey. 447.

PUBLIC LANDS.**FENCE.**

May be erected by an owner of lands, if wholly within the limits of his own property, even if it happens to actually inclose certain public lands. 793.

LIMITATION.

Begins to run against a grantee of the United States from the date of final proof and payment. 793.

SHORE LANDS.

Belonging to the United States; become, upon the admission of a Territory into the Union as a State, the property of such State. 793.

PUBLIC OFFICERS.**CLERK OF COURT.**

Is liable for failure to record pleadings and judgments, as required by law. 192.

COUNTY TREASURER.

Cannot contract to collect delinquent taxes for a stipulated per cent. of the interest and penalties. 793.

Is not accountable for funds received by his predecessor and not transferred to him. 63.

CUSTODIAN OF PUBLIC MONEY.

Who has given bond for its safe keeping, is not discharged from liability by the failure of the bank where he has deposited such money. 731.

FISH INSPECTOR.

Has judicial duties, and is not liable for the manner of their performance. 64.

KEEPER OF JAIL.

Who receives United States prisoners, and is paid for their maintenance, is an officer of the court, and punishable as such. 793.

POWER TO REMOVE.

Does not include power to suspend. 575.

SALARIES.

Are not subject to attachment for debt. 285.

U. S. DEPUTY SURVEYORS.

Statutory affidavit of, cannot be made before either a notary public or Commissioner of the U. S. Circuit Court. 668.

U. S. MARSHALS.

Are, within the scope of their authority, national peace officers, with all the statutory and common law powers appertaining to peace officers. 585.

RAILROADS. See CONSTITUTIONAL LAW, DAMAGES, EMINENT DOMAIN, EVIDENCE, FIXTURES, LIBEL, MASTER AND SERVANT, MECHANICS, LIENS, NEGLIGENCE, RECEIVERS, SUNDAY LAWS, TAXATION, TELEPHONES.

BRAKEMAN.

May recover from railroad company for injuries caused by reason of a bull on the track. 509.

Or a defect in a car-coupling which is not obvious. 148.

BRIDGE.

Built by railroad company at the crossing of a public street, must be constructed and maintained in such a manner as to render it safe for public travel. 731.

CONTRIBUTORY NEGLIGENCE.

Under what circumstances contributory negligence will not be inferred. 318.

Failure to stop, look and listen, will prevent recovery for an injury sustained at a crossing, even though the gates were not lowered, no warning given, nor lights shown. 447.

Recovery cannot be had for death of person walking on track, however negligent the railroad company may have been. 509.

What is such negligence on the part of one injured at a railroad crossing, as will relieve the railroad company from liability. 575.

CROSSING.

Warning must be given of the approach of a train to a crossing, although the railroad passes over the highway upon a trestle. 509.

DAMAGES.

Rules governing measure of damages for wrongful expulsion. 98, 99. Fright and mental suffering are proper elements of damage in an action for the unlawful ejection of a woman from a passenger train. 252.

Under what circumstances punitive damages may be recovered by a passenger from a railroad company. 255.

DEPOT GROUNDS.

Are under the same complete and exclusive dominion of a railroad corporation as that exercised by every individual over his own property, and it may exclude and admit whom it pleases, coming to transact private business. 383.

EMINENT DOMAIN.

Public use, such as will authorize the taking of land by a railroad company, does not exist, where the purpose is to build a switch or branch road to reach a private manufactory. 255.

FARES.

Reasonable additional charge may be made when fare is paid on train. 98.

But only when there is an office at the station, where passenger could have bought a ticket. 95.

Payment may be made at any time before conductor has stopped the train and begun to eject the passenger. 96.

FIRE.

To avoid liability for burning hay by sparks from a locomotive, the jury must find that the employes were competent and skillful, and the locomotive properly equipped and operated. 64.

Under what circumstances recovery for damages alleged to have been caused by fire started by a locomotive, cannot be had. 383.

What evidence is sufficient to warrant the inference that a fire which damages crops, originated from a passing locomotive. 447.

INSPECTOR OF FREIGHT CARS.

Is a fellow servant of the other employes, and the railroad company is not liable to such employes for injuries caused by negligent inspection of loaded cars. 575.

RAILROADS—(continued.)**IRREGULAR TICKETS.**

Where conditions under which a ticket has been issued are violated, the railroad may refuse to accept it. 92.

But passenger is entitled to notice of such conditions. 92.

LABORERS.

Engaged in laying a new track, are entitled to proper signals of the approach of trains on the adjoining track. 793.

LIMITED TICKETS.

Not good after expiration of limit, and passenger may be ejected if he refuse to pay his fare. 90.

Sufficient if journey be begun before midnight of the day of expiration, even if not completed on that day. 90.

But journey must be continuous. 91.

If limitation does not appear on face of ticket, and passenger has no other notice, it may be used. 91.

Words, "Good for this trip only," relate to journey, not to time. 91.

Expired ticket, when unused and not obtained by fraud, belongs to passenger. 91.

LOSS OF TICKET.

Falls on passenger. 88.

Berth in sleeping car is not within this rule. 89.

No decision upon question where conductor has seen and punched ticket before its loss. 90.

Reasonable time must be given to find ticket. 97.

PASSENGER.

In England cannot be removed from train for refusal to produce ticket or pay fare, where the by-law of the railway company which requires this to be done, makes no provision for its enforcement by expulsion. 81.

Right to remove for non-compliance with such by-law cannot be implied as part of the contract of carriage. 81.

But in United States, failure to produce ticket, or pay fare, justifies ejection. 90.

And where rules require ticket to be purchased before entering train, payment on train need not be accepted. 90.

But not so where ticket office is shut, and there is no negligence by passenger. 90.

Negligence by passenger will prevent recovery. 95.

One not a trespasser can only be put off at regular station. 97.

But a trespasser may be put off anywhere, provided it does not expose him to serious danger. 97.

Passenger may be forcibly expelled, provided no unnecessary force is used. 98.

But may not forcibly resist expulsion, even when entitled to ride. 98.

Even trespassers must not be exposed to serious risks. 98.

Intoxication does not excuse want of ordinary care and prudence by a passenger. 128.

Disorderly passenger, or one using profane, obscene or vulgar language, may be forcibly ejected from train. 192.

Sick passenger may be removed from a car, but not without due care and provision for his safety. 255.

Intoxicated passenger, who uses violent and indecent language, pulls the bell-rope and threatens the conductor with a knife, may be ejected from the train at night and at a place distant from any station. 318.

PENALTY.

In England fraudulent intent is necessary to sustain recovery for the penalty imposed by statute without payment of fare. 87.

RAILROADS—(continued.)

But failure to produce ticket is *prima facie* evidence of fraud. 87.

Use of non-transferable ticket by one not the purchaser is fraudulent. 87.

In United States and Canada such penalties are rarely enforced. 88.

PURCHASE OF TICKETS.

From one not an agent of railway company for sale of tickets is at risk of purchaser. 93.

Fraud by purchaser, or failure of consideration, justifies refusal. 93.

SEATS.

Railroad is bound to provide seats for passengers, but they need not be perfectly satisfactory. 95.

STOP-OVER PRIVILEGE.

In absence of, stopping over is an abandonment of the right to demand passage for the rest of the distance. 91.

Who may grant privilege. 91.

In Maine given by statute. 91.

SUNDAY TRAINS.

When a railroad permits persons to ride upon a freight train running specially on Sunday, though exacting no fare, it assumes the same duties to them as to regular passengers. 318.

TELEGRAPH OPERATOR.

Is not a fellow-servant with a brakeman. 793.

TICKET.

Of firm, entitling either partner to ride, but only one on any train, must be presented upon every trip. 384.

TICKET AGENTS.

Acts and statements of, do not affect controversies between conductor and passengers. 93.

Exceptions to rule. 93, 94.

How far such acts and statements are admissible against company. 94.

RECEIVERS.**DISTRIBUTION.**

Claim of consignee for the value of goods lost by fire while in possession of a railroad company, and before the receivership, is not entitled to priority over the claims of bondholders. 509.

RELEASE.**JOINT TORT-FEASORS.**

Settlement and release of claim against one or two joint tort-feasors will bar an action against the other. 509.

REMOVAL OF CAUSES.**ALIEN.**

Suit by, cannot be removed on the ground of local prejudice. 794.

CORPORATION.

An action against a corporation created under the laws of another State may be removed to the Federal Courts, although such corporation has an office and agents, and does business, in the State where suit is brought. 510.

DIVERSE CITIZENSHIP.

Must be sufficiently shown on the record, or the cause will be remanded, even after appeal. 794.

LOCAL PREJUDICE.

Is not sufficient ground for removal, when such prejudice is confined to a single county, and the State laws allow a cause to be removed to another county of the same State. 510.

Is sufficient ground for removal, without regard to the amount in controversy. 575.

PENALTY.

Action for, by State official, cannot be removed. 510.

REMOVAL OF CAUSES—(continued.)**RESIDENT DEFENDANT.**

May remove cause, in which he has been sued by a citizen of another State. 575.

STATE COURT.

Has no power, when the petition and bond are in proper form, to determine an issue of fact raised upon the petition. 510.

REPLEVIN.**ATTACHMENT.**

Goods attached by an officer of the law, under legal process, cannot be replevied. 510.

REVENUE LAWS.**ARRIVAL OF VESSEL.**

Vessel driven ashore by stress of weather has not "arrived" within the limits of a collection district, within the statutory meaning. 794.

FORFEITURE.

Action for, is abated by the death of the defendant. 511.

INVOLUNTARY PAYMENTS.

Of duties, what constitutes. 794.

REWARD.**ACCEPTANCE.**

Performance of conditions of proposal, publicly made to unascertained persons, constitutes an acceptance. 112.

But not where the party performing had no knowledge of the proposal. 116.

OFFER.

When acted on, is binding upon private citizen making it. 112.

But only when the acts done have been with a view to the acceptance and performance of the contract tendered by the offer. 116, 117.

PUBLIC OFFICER.

Is entitled to claim reward for performance of an act which is not part of his official duty. 112.

SALE. See CHATTEL MORTGAGE, LIQUOR LAWS.**DELIVERY.**

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What is sufficient to comply with the statute. 192.

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Contract to sell stock at the end of three years, with an option to the purchaser to call it at any time, is not within the prohibition of a statute which forbids an action upon any agreement "not to be performed within a year," unless in writing. 511.

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By purchaser to pay the price to a third person in liquidation of a debt due the latter by the vendor, is not within the statute. 255.

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Renders broker liable to principal for the loss resulting from the failure to obey instructions, although when directed to sell the principal is indebted to him in an amount greater than the market value of the stock. 256.

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SUNDAY LAWS. See RAILROADS, TELEGRAPHS.**ANIMALS.**

Recovery may be had for injury inflicted by dog upon one traveling on Sunday. 165.

Also for injury caused by negligently alarming horse. 166.

Also for injury inflicted upon horse by one who has hired him from a liveryman for Sunday driving. 166.

Otherwise in Maine and Rhode Island. 168.

CARRIERS.

In Massachusetts, recovery cannot be had by one injured by the negligence of a carrier, while traveling on Sunday. 162.

But the great weight of authority is otherwise. 163, 169.

DAMAGES.

Not aggravated, because inflicted by one violating the Sunday law. 169.

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No greater diligence is required of one violating a Sunday law than when performing the same act on a week day. 166.

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Of contract on Sunday, renders it void. 731.

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Entered on Sunday, is void at common law. 511.

LABOR.

One injured, while performing labor on Sunday, by the negligence of another, is not estopped from recovery. 165.

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RAILROAD EMPLOYEE.

Brakeman, engaged in common labor on freight train, in pursuance of a general contract with a railroad, and injured by the latter's negligence, may recover for such injury, notwithstanding the fact that it was sustained upon Sunday. 148.

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Whether shaving for hire on Sunday is a work of necessity, is a question for the jury. 795.

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Contract for advertising in, is unlawful and incapable of ratification. 795.

TRAVELING. See CARRIERS.

One sustaining an injury from a defect in the highway, while traveling on Sunday, cannot recover in Massachusetts. 158.

Unless traveling for purposes of necessity or charity. 159.

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This rule has not been followed in other States. 162, 163, 169.

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TELEGRAPHS. See TELEPHONES.**DAMAGES.**

Failure to deliver message to physician renders telegraph company liable for increased suffering and injury to feelings caused thereby. 128.

Mental anguish is a proper element of damage for delay in the delivery of a telegram. 319.

And for breach of a contract to transmit money. 511.

DELAY.

Damages for delay in delivery of a message to a physician, and the reasonableness of the rules causing such delay, are both questions for the jury. 795.

LICENSE TAX.

Cannot be imposed by State or municipal authority, upon a telegraph company, whose lines are used for the transmission of interstate messages. 795.

LIMITATION OF LIABILITY.

Stipulation that a telegraph company shall not be liable for negligence in the delivery of a message, unless claim in writing is presented within sixty days, is against public policy and void. 512.

RECEIVER.

Of message has no contractual relation with the telegraph company, and, if injured by the latter's negligence, his remedy is in tort. 448.

Thus he may maintain an action for negligence in its delivery. 512.

REPEATED MESSAGE.

Stipulation limiting liability, if a message is not repeated, does not apply to an action for delay in delivering an unrepeated message. 319.

SUNDAY MESSAGE.

Failure to deliver, does not render the company liable for penalty, unless a necessity for its transmission exists, and the company has notice of such necessity. 319.

STIPULATION.

In telegraph blank, that the company shall not be liable for mistakes in transmitting messages, caused "by the negligence of its servants or otherwise," is against public policy and void. 732.

TELEPHONES.**ACKNOWLEDGMENT OF DEED.**

By married woman through a telephone is valid, in the absence of fraud, duress or mistake. 795.

DEFINITION.

In general sense, "telephone" applies to any instrument or apparatus transmitting sound beyond the limits of ordinary audibility. 65.

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DISCRIMINATION.

Telephone company is a common carrier and bound to treat all alike. 70, 72.

EMINENT DOMAIN.

Erection of telephone poles and wires is a public use, for which private property may be appropriated. 66.

EVIDENCE.

Party receiving message through medium of operator may prove, in a subsequent suit between himself and sender of message, what was said by the operator, the latter having forgotten. 75.

EXCLUSIVE CONTRACT.

To furnish telephonic facilities to one telegraph company, is void. 796.

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Erection of poles on highway is such an additional burden upon the fee that compensation must be made to the owner. 67.

But not so where the fee is in the public. 67.

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When admissible in an issue to try the validity of a will, and for what purpose. 256.

DEVISE.

When life estate is given. 64.

To one in fee, but should he "depart this life without leaving lawful issue to survive him," then such "property as would have fallen" to him, shall be given to another, limits the death of the first taker to the testator's lifetime. 320.

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Gift of, passes fund itself. 192.

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By a legatee, for the purpose of preventing the revocation of the will, renders the legacy void. 796.

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REAL ESTATE.

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"SURVIVING BROTHERS AND SISTERS."

When construed not to refer to death in the lifetime of the testator. 732.

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What is insufficient evidence of. 384.

A test of, is the capacity of the testator to remember the property he is about to dispose of and the objects of his bounty, and to understand the nature of the business in which he is engaged and the manner in which the will distributes his property. 732.

A belief in spiritualism does not indicate testamentary incapacity. 732.

UN SOUNDNESS OF TESTATOR'S MIND.

Not affecting the character of a will, will not in itself prevent the will from being adjudged valid. 796.

VOID BEQUEST.

Bequest of library, together with testator's residuary estate, to the mayor of a city and the presidents of two medical colleges and their successors, in trust forever, for the purpose of founding a public library, is void. 320.

VOID DEVISE.

Devise to trustees for the use of a charitable institution to be incorporated within ten years by special act of the legislature, is void for uncertainty. 448.

